SMT. PARAYANKANDIYAL ERAVATH KANAPRAVAN KALLIANI AMMA AND ORS.

v.

K. DEVI AND ORS.

APRIL 26, 1996

[KULDIP SINGH AND S. SAGHIR AHMAD, JJ.]

Hindu law :

Hindu Marriage Act, 1955 : Section 16.

Void marriage—Children—Legitimacy of—Second marriage—Contract of—During subsistence of first marriage—Prior to commencement of Act—Void under S. 5 of Madras Marumakkattayam Act, 1932 then in force—Held : Children born of void second marriage entitled to inherit share in the properties of their parents by operation of amended S. 16.

Section 16—Amendment—Legitimacy—Nature of—Pre-amended S. 16—Classified illegitimate children into two groups—Those born of void marriages contracted before Act—And those born of void marriages contracted after Act came into force—Held : Section 16 violative of Article 14 of the Constitution.

Section 16—Amendment of—Position thereafter—Amendment removed the mischief and also delinked S. 11 from S. 16—Hence, amended S. 16 was constitutionally valid—It enacted legal fiction whereby illegitimate children were deemed legitimate—Thereby entitling them to succeed to properties of their parents.

Madras Marumakkattayam Act, 1932 :

Section 5—Polygamy—Void under—Act repealed by S. 7(2) of Kerala Joint Family System (Abolition) Act, 1975—Effect of—Contract of second marriage during lifetime of first wife—Prohibition under S. 5 would operate—Such second marriage would not be affected by the repeal by virtue of S. 4 of Kerala Interpretation and General Clauses Act, 1925—Kerala Joint Hindu Family System (Abolition) Act, 1975, S. 7(2)—Kerala Interpretation and General Clauses Act, 1925, S. 4.

Constitution of India, 1950 : Article 14 :

A *Statute—Constitutionality of—Presumption in favour of—Burden of proof is on person challenging constitutionality—To show arbitrary discrimination between persons similarly circumstanced—Presumption—Displacing of—By showing discrimination was apparent and manifest—Duty of Court to look to the statute as a whole to see if classification was valid having nexus with object sought to be achieved.*

B

Interpretation of Statutes :

Interpretation—Subsidiary rules of—Legal fiction—Purpose of—Parties between whom it was to operate—To be ascertained by Court to give full effect C *to legislative intent and to carry the purpose to its logical end.*

Mischief Rule—Language having more than one meaning—Applicability of—Rule in Heydon's case—When and how to be invoked—Non-obstante clause—Operation and interpretation of.

D **RN contracted a second marriage with Appellant No. 1 during the lifetime of his first wife who was the mother of Respondents 1 to 9, in contravention of the prohibition of such a second marriage under Section 5 of Madras Marumakkattayam Act, 1932 which was then in force. The question before this Court was whether Appellants 2 to 6, who were the** E **children born of the second marriage, would inherit any share in the properties left behind by RN after his death.**

Allowing the appeal, this Court

HELD : 1.1. Section 7(2) of Kerala Joint Hindu Family System F **(Abolition) Act, 1975 by which the Madras Marumakkattayam Act, 1932 was repealed does not indicate any intention contrary to the provisions contained in Kerala Interpretation and General Clause Act, 1925 which, will apply with full vigour on the principle that whenever there is a repeal of any enactment, the consequences indicated in Section 4 would follow,** G **unless there was any saving clause in the repealing enactment or any other intention was expressed therein. In the case of a simple repeal, there is hardly any room for the expression of a contrary view. Repeal in the instant case is a case of repeal simplicitor. Hence, in view of section 4(b) of Kerala Interpretation and General Clauses Act, the previous operation of Madras Act will not be affected by the repeal nor will the repeal affect anything** H **duly done or suffered thereunder. So also, a liability incurred under that**

Act will remain unaffected and will not be obliterated by the repeal as indicated in Section 4(c). RN had contracted a second marriage, in the lifetime of his first wife, when Madras Act was in force, which prohibited a second marriage and, therefore, the consequences indicated in the Act that such a marriage would be void would not be affected nor will the previous operation of the Act be affected by the repeal of that Act. The repeal does not mean that Madras Act never existed on the Statute Book nor will the repeal have the effect of validating RN's second marriage, if it was already a void marriage under that Act. [17-H, 18-A-D]

Balakrishna Menon v. *Asst. Controller of Estate Duty,* AIR (1971) SC 2390; *Venugopala Ravi Verma* v. *Union of India,* AIR (1969) SC 1094; *Achuttan Nair* v. *C. Amma,* AIR (1966) SC 411 and *Padmavathy Amma* v. *Ammuni Panicker,* AIR (1995) SC 2154, relied on.

Bhaurao v. *State of Maharashtra,* AIR (1965) SC 1564 and *Kochunni* v. *Kuttanunni,* AIR (1948) PC 47, referred to.

1.2. Since the Rule of Legitimacy under Section 16 of Hindu Marriage Act, 1955 (HMA) was made dependent upon the marriage (void or voidable) being annulled by a decree of annulment, the children born of such marriage, would continue to be illegitimate if the decree of annulment was not passed, which, incidentally, would always be the case if the parties did not approach the Court. The other result was that the illegitimate children came to be divided in two groups; those born of marriage held prior to the Act and those born of marriage after the Act. There was no distinction between these two groups of illegitimate children, but they came to suffer hostile legislative discrimination on account of the language employed therein. Indeed, language is an imperfect instrument for the expression of human thought. [27-E-G]

1.3. The object of Section 16. HMA was to protect legitimacy of children born of void or voidable marriages. In leaving out one group of illegitimate children from being treated as legitimate, there did not appear to be any nexus between the object sought to be achieved by Section 16, HMA and the classification made in respect of illegitimate children similarly situate or circumstanced. Section 16, HMA was earlier linked with Sections 11 and 12, HMA. On account of the language employed in unamended Section 16 and its linkage with Sections 11 and 12, the provisions had the effect of dividing and classifying the illegitimate

A children into two groups without there being any nexus in the statutory provisions and the object sought to be achieved thereby. [27-H, 32-F-G]

State v. *Narsu Appa Mali,* ILR (1951) Bombay 775; *Srinivasa Iyer* v. *Saraswathi Ammal,* ILR (1953) Madras 78 and *G. Sambireddy* v. *G. Jayamma,* AIR (1972) A.P. 156 referred to.

B

1.4. Legitimacy is a matter of status. Illegitimate children, on the contrary, are children as are not born either in lawful wedlock, or within a competent time after its determination. It is on account of marriage, valid or void, that children are classified as legitimate or illegitimate. That
C is to say, the social status of children is determined by the act of their parents. If they have entered into a valid marriage, the children are legitimate; but if the parents commit a folly, as a result of which a child is conceived, such child who comes into existence as an innocent human baby is labelled as illegitimate. Realising this situation, Parliament made a law which protected the legitimacy of such innocent children. [26-E, G-H]

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Ampthill Peerage Case, (1976) All ER 411 and *Salemi* v. *Minister for Immigration and Ethnic Affairs,* (1977) 14 ALR 1 (7), referred to.

"*Commentaries on the Hindu Marriage Act,* 1955" by K.P. Saksena; "*Principles of Hindu Law*" by Jogendra Chunder Ghose, 1903 Edn. and
E "*Hindu Law of Marriage Stridhana*", 4th. Edn. (reprinted in India in 1984), referred to.

2.1. Whenever an enactment is attacked on the ground of discrimination, it becomes the duty of the court to look to the legislation as a whole
F and to find out why class legislation was introduced and what was the nexus between the classification and the object sought to be achieved by it. There is always a presumption that an Act made by the Parliament or the State Legislature is valid; so also there is a strong presumption in favour of the validity of legislative classification. It is for those who challenge the Act as
G unconstitutional to show and prove beyond all doubts that the legislature arbitrarily discriminated between different persons similarly circumstanced. This presumption, however, can be displaced by showing that the discrimination was so apparent and manifest that any proof was hardly required. Section 16, as originally enacted, fell under this category. To the extent it discriminated between two groups of illegitimate children in the
H matter of conferment of status of legitimacy, it was violative of Article 14.

The vice or the mischief from which unamended Section 16 suffered has been removed or not is the next concern of this Court. [18-G, 30-E-G] A

2.2. In order to give full effect to what was intended to be achieved by enacting Section 16, the Parliament intervened and amended Section 16. The words "notwithstanding that a marriage is null and void under Section 11" employed in Section 16(1) indicate undoubtedly the following: B

(a) Section 16(1) stands delinked from Section 11.

(b) Provisions of Section 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigour in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contavened. C

(c) Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) was amended. D

(d) Mischief or the vice which was the basis of unconstitutionality of unamended Section 16 has been effectively removed by amendment.

(e) Section 16(1) now stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy. Section 16, in its present form, is, therefore, not ultra vires the constitution. [33-C-F] E

K.P. Verghese v. *Income-tax Officer, Ernakulam and Anr.,* 131 ITR 597; *Bengal Immunity Co. Ltd.* v. *State of Bihar,* AIR (1955) SC 661; *Goodyear India Ltd.* v. *State of Haryana,* AIR (1990) SC 781; *C.I.T., M.P. & Bhopal* v. *Sodra Devi,* AIR (1857) SC 832; *Union of India* v. *G.M. Kokil,* [1984] Supp. SCC 196; *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Gurnam,* [1986] 4 SCC 447 (477); *R.S. Ragunath* v. *State of Kamataka,* [1992] 1 SCC 335; *Heydon's* case (1584) 3 Co. Rep 7a; *Mayfair Property Company,* (1898) 2 Ch 28 (CA); *Eastman Photographic Materials Company Ltd.* v. *Comptroller-General of Patents, Designs and Trade-Marks,* (1898) AC 571, 576 (HL) and *Munsell* v. *Olins,* (1975) 1 All ER 16 (HL) p-29, referred to. F G

T. Ramayammal v. *T. Mathummal,* AIR (1974) Mad. 321, approved. H

A *"Principles of Statutory Interpretation"* By G.P. Singh, referred to.

3.1. Section 16 contains a legal fiction. It is by a rule of *ficto juris* that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable. [33-H]

B

3.2. In view of 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. [34-E]

C

3.3. When an Act of Parliament or a State Legislature provides that something shall be deemed to exist of some status shall be deemed to have been acquired, which not have been so acquired or in existence but for the enactment, the Court is bound to ascertain the purpose for which the D fiction was created and the parties between whom the fiction was to operation, so that full effect may be given to the intention of the legislature and the purpose may be carried to its logical conclusion. [34-A-B]

M/s. J K Cotton Spg. & Wvg. Mills Ltd. v. *Union of India,* AIR (1988) SC 191, *American Home Products Corporation* v. *Mac Laboratories,* [1986] E 1 SCC 465 and *M. Venugopal* v. *Divisional Manager, LIC,* [1994] 2 SCC 323, relied on.

East End Dwellings Co. Ltd. v. *Finsbury Borough Council,* (1952) AC 109 B, referred to.

F

4. Appellants 2 to 6 were born prior to the date on which amendments were introduced in Section 16(1), and consequently they would, notwithstanding that the marriage between their parents had taken place at a time when there was a legislative prohibition on the second marriage, to be treated as legitimate, and would, therefore, inherit the properties of G their father, RN, under Section 16(3) of the Act. [34-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5473-75 of 1995.

From the Judgment and Order dated 22.6.89 of the Kerala High H Court in A.S. Nos. 68 and 70 of 1980 and 5 of 1981.

P.S. Poti and K.R. Nambiar for the Appellants. A

T.L. Viswantha Iyer, Ms. Pushpa Rajan and K.B.S. Rajan for the Respondents.

The Judgment of the Court was delivered by

B

S. SAGHIR AHMAD, J. "A million million spermatozoa
All of them alive :

Out of their cataclysm but one poor
Noah
Dare hope to survive. C
And among that billion minus one
Might have chanced to be
Shakespeare, another Newton, a new Donne.
But the one was me."

So said Aldous Huxley, perhaps, in desperation and despondency. D And, that is how a person would feel on being bastardized by a court verdict, disentitling him from inheriting the properties left by his father. This is the theme of the present judgment which we are required to write in view of the following facts :

2. Parayankandiyil Kanhirakunnath Kurungodan Raman Nair was the E proud father of 14 children from two wives, the first being Ammu Amma, who is the mother of the respondents 1 to 9, and the second being a lady of equally long name, namely, Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma (appellant No. 1), who is the mother of appellants 2 to 6. He had a flair for two; two wives, two sets of children, two sets of properties, in two different F States. P.K.K. Raman Nair died on 9th January, 1975, and since he left behind considerable movable and immovable properties in the States of Kerala and Tamil Nadu, litigation was the usual and destined calamity to befall the children for settling the question of inheritance.

3. The litigation started with the filing of O.S. No. 38 of 1976 and G O.S. No. 39 of 1976 in the court of Subordinate Judge at Badagara, Kerala, by the respondents for a decree for possession over certain properties, which allegedly were in the possession of the appellants, and for half share by partition in the tenancy land held in common by late P.K.K. Raman Nair with his second wife, namely, appellant No. 1. The appellants did not lag behind and they filed a suit (O.S. No. 99 of 1977) for partition of the H

A properties of late P.K.K. Raman Nair, which were said to be in the possession of the respondents.

4. Respondents had instituted the suits on the basis of their title, with the allegations that the appellant Nos. 2 to 6 and their mother, namely, appellant No. 1, were not the legal heirs of Raman Nair, while the appel-
B lants had instituted their suit (O.S. No. 99 of 1977) for partition of the properties indicated in schedules A, B & C to the plaint, on the ground that they being the legal heirs of Raman Nair were entitled to a share in the properties left by him along with the respondents.

5. All the three suits were tried together by the trial court and were
C dismissed with the finding that the second marriage of Raman Nair with appellant No. 1 had taken place at a time when his first wife, Ammu Amma, was alive and, therefore, it was invalid, with the result that the appellant Nos. 2 to 6, who were the children born of the second marriage, would not inherit any share in the properties left by Raman Nair.

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6. Three appeals were consequently filed in the High Court and the only question urged before the High Court was that the second wife and children were also the legal heirs of Raman Nair, but the High Court by its impugned judgment and order dated 22.6.1989 dismissed the appeals with a little modification that the house in the plaint schedule property in O.S. No. 39 of
E 1976 was directed to be allotted, as far as possible, to appellant No. 1 as she was living in that house with her children. Hence these appeals.

7. Mr. P.S. Poti, Sr. Advocate, appearing on behalf of the appellants, has contended that the trial court as also the High Court were in error in dismissing the suit of the appellants for partition of their share in the property
F as the appellants were the legal heirs of Raman Nair and the inheritance could not be denied to them merely on the ground of his second marriage with appellant No. 1, particularly as Section 16 of the Hindu Marriage Act, 1955 specifically provides that, notwithstanding that a marriage is null and void, any child of such marriage, who would have been legitimate if the marriage had
G been valid, shall be legitimate and get an interest in the property of his parents, but not in the property of any other person.;

8. The contention of the learned counsel for the respondents, on the contrary, is that benefit of Section 16 can be given only to such marriages as are null and void under Section 11 of the Hindu marriage Act, 1955 and
H not to any other marriage. His contention further is that a marriage would

be null and void under Section 11 only if it is performed after the coming into force of the Act and, therefore, all other marriages which were performed prior to the Hindu Marriage Act, 1955, would not be covered by Section 16 and children born of such marriage would not be entitled to the benefit of statutory legitimacy or inheritance.

9. It may be mentioned that one of the contentions raised before the High Court was that if the benefit of legitimacy contemplated by Section 16 of the Act is not extended to children born of the second or invalid marriages held prior to the Act, the provisions would have to be struck down as violative of Article 14 of the Constitution, inasmuch as they purport to create two classes of illegitimate children, namely, those born of the invalid marriages prior to the Act and those born of the void marriages performed after the enforcement of the Act. This was not accepted by the High Court which was of the opinion that the provisions of Section 16 were not violative of Article 14 of the Constitution.

10. Marriage, according to Hindu Law, is a holy union. It is not a contract but a *Sanskara* or sacrament.

11. The religious rites solemnizing a marriage include certain vows and prayers by the parties made before the altar of God. Mr. K.P. Saksena has reproduced the original Sanskrit vows in his book "Commentaries on the Hindu Marriage Act, 1955" from the "Vivah Padathi" (marriage code according to Laugakshi) complied and translated by Pt. Bindheswar Nath Razdan Shastri, Raj Vaidya. The translated portion is given below :

> "In the three mantras of Laja (parched paddy) Hawan, the bride says :—
>
> "I give oblation to the Fire god, the destroyer of enemies. With the grace of the side destroyer of enemies, may I never be separated from my husband's house.
>
> Other unmarried girls have worshipped the Fire God, the sustainer of the earth, for the fulfilment of their desire. Knowing that their desire were fulfilled. I have also made an oblation, may the same Fire God, sustainer of the earth, be pleased and with his grace may I never be separated from my husband's house.
>
> I worship Shankar in the form of Fire God, the god of good

repute and the protector of husband. May by the grace of Shankar, the Fire God, I and my husband be freed from death as the ripe melon is freed from its knot in the creeper. With His grace may I never be separated from may husband's house.

May this oblation be acceptable to the fire God. May sacred fire separate me from this (my father's) house but never from my husband's.

May my husband live long and my kinsmen be prosperous. May this oblation be acceptable to the Fire God.

I cast this parched paddy in fire. May it make you (the husband) and me prosperous. The boon be granted by agni."

Similarly, bridegroom says to the bride :–

"O bride! trace your first step, by this may our foodstuffs increase. May God let me keep your company till I live.

O bride! trace your second step, by this may our strength grow, may God let me keep your company till I live.

O bride! trace your third step, by this may our wealth increase. May God let me Keep your company till I live.

O bride! trace your fourth step, by this may our comforts and pleasures increase. May God let me keep your company till I live.

O bride! trace your fifth step. May your progeny increase. May God let me keep your company till I live.

O bride! trace your sixth step. May we always get the fruits and flowers of the six seasons. May God let me keep your company till I live.

O bride! trace your seventh step. By this may we live long and our relations be loving. May God let me keep your company till I live."

12. The effect of these promises and prayers is that the marriage becomes indissoluble and each party becomes the complementary half of

the other so that separation becomes unthinkable. A

13. The terms prescribed by the Dharam Shastras, secure to the wife a high and strong position, as is indicated by the dialogue between the bride and the bridegroom during Saptapadi which again have been quoted in his book by Mr. K.P. Saksena on being supplied to him by Sahityacharya Shri Pandit Rameshwar Dwivedi. They are as under : B

"The bridegroom says :

"Madhupark has destroyed sins in the fire of Laja Hawan, so long as the girl does not sit on the left side, she is unmarried. C

Madhupark have been performed first and oblation of parched paddy having been offered to the fire, so long as the girl does not sit on the left side she is unmarried.

The bridegroom says to the bride : "Do not go without my D permission, to a park, to one who is drunk, to king's court and to your father's house."

"The bride says "Perform along with me the Bajpeya, Ashwamedha and Rajsuya Yagas, tuladan and marriage." E

"With my consent and long with me consecrate Beoli, well and tank etc., and God's temples and take bath during the months of Magh, Kartik, and Baisakh."

Select a friend or enemy, a place worth a visit or not, go on F pilgrimage, perform a marriage and engage in framing and commerce after obtaining my consent and long with me.

Render into my hands what you earn by the grace of God whether it be hundred, a thousand, a hundred thousand, a thousand million and ten million. G

After obtaining my consent purchase, sell or exchange a cow, a bull or a buffalo, a goat, an elephant a house or a camel.

My Lord, you should be my friend in the same way as Krishna is of Arjun. Brahaspati is of Indra and as Swati is of Chatak." H

A 14. Once "Saptapadi" is completed the marriage tie becomes unbreakable.

15. The legal position of a second marriage under the original Hindu Law is described in 'Principles of Hindu Law' by Jogendra Chunder Ghose, 1903 Edition, as under :

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> 'Polygamy was not allowable according to the spirit of the law, but it was very generally practised, though the second wife could not be associated in religious sacrifices, and was styled a wife not for duty but for lust."

C

16. Sir Gooroodas Banerjee in his book Hindu Law of Marriage and Stridhana, 4th Edition (re-printed in India in 1984)" lays down as under :

> "A Hindu husband is always permitted to marry again during the lifetime of his wife, though such marriage, if contracted without
D just cause, is strongly disapproved. "The first is the wife married from a sense of duty," and the others are regarded as married from sensual motives. "With sorrow," says Daksha feelingly, "does he eat who has two contentious wives; dissension mutual enmity, meanness, and pain distract his mind; but his commentator, Jagannath, who lived at a time when kulinism and polygamy were widely
E prevalent, tries to soften the effect of the text, by showing that if the wives be complacent, none of the evil consequences would follow. The causes which justify supersession of the wife and re-marriage during her lifetime, are barrenness, ill-health, ill-temper, and misconduct of the wife.
>
F It should be observed that supersession (which is adhivedana in Sanskrit) here means, as explained in the Mitakshara and the Subodhini, merely the contracting of a second marriage while the first wife lives; and it does not imply that the first wife is actually forsaken, or that her place is taken by the second, in respect of
G any matter except perhaps the husband's affection. It is true that Vijnaneswara in one place uses supersession and desertion as synonymous, but Sulpani, another high authority, uses the term in the sense given above, and Jagannatha appears to follow the latter. This view is further confirmed by the rules regarding precedence among wives, which is settled by law with a view to prevent
H disputes."

17. Mr. K.P. Saksena, in his Commentary on the Hindu marriage Act, 1955, 3rd Edition (1964), writes as under : A

"According to the Hindu Jurisprudence, a husband is always permitted to marry again during the lifetime of the first wife but such marriage, if contracted without just cause, is strongly disapproved. Manu has justified the supersession of the wife and remarriage during her lifetime on the following grounds, viz. (i) barrenness, (ii) ill-health, (iii) ill-temper and misconduct of the wife, vide, Manu (IX, 80-81). B

He further maintains that (1) the first wife is married from a sense of duty and (2) the others are regarded as married from sexual motives, vide, Manu (III, 12-13). C

Supersession has been explained in Mitakshara and Subodhini as a contract of second marriage while the first wife is alive and not the desertion of the wife, for in desertion she is deprived of her rights such as association in performance of religious rites, religious duties, adoption, etc. In Ranjit Lal v. Bijoy Krishna, it has been held that adoption by a senior widow though late in time is valid notwithstanding an earlier adoption by a junior widow without the consent of the senior widow whose adoption was declared to be invalid, though both were authorised to adopt by the deceased. The Rishis do not approve of unrestricted polygamy. They permit men to take a second wife in the lifetime of the first only under special circumstances. Thus Manu says : "A wife, who drinks any spurious liquors, who acts immorally, who shows hatred to her lord, who is incurably diseased, who is mischievous, who wastes his property, may at all times be superseded by another wife. A barren wife may be superseded by another in the 8th year; she who brings forth stillborn children or whose children all infants die in the tenth; she who brings forth only daughters, in the eleventh and she who speaks unkindly, without delay." It is, therefore, incorrect to supposed that the Hindu Law permits a man to espouse a second wife during the life of the first except under particular circumstances. Manu appears to present the perfect ideal of conjugal fidelity by requiring both the husband and the wife to be faithful to each other. Thus in conclusion on the subject D E F G H

A of mutual duties of husband and wife, the sage ordains : Let mutual fidelity continue till death : this, in few words, made be considered as the supreme law between husband and wife; let a man and a woman united by marriage, constantly beware, lest at any time being disunited they violate their mutual fidelity." (Manu IX, 101-102; V, 162-168)." This passage clearly implies monogamy to be B essential condition of the supreme law of conjugal duties. But it should be observed that the sages did not prohibit polygamy which was prevalent at the time but the tendency of their legislation was to discourage that practice by investing the first marriage with a religious character, and by permitting the marriage for religious C purposes of a second wife in the lifetime of the first, only in certain contingencies when there was a failure of the object of marriage.

18. From the above, it would be seen that though polygamy was not permitted, a second marriage was allowed in a restricted sense, and that too, under stringent circumstances, as for example, there was a total failure D of the object of marriage. Monogamy was the Rule and Ethos of the Hindu Society which derided a second marriage and rejected it altogether. The touch of religion in all marriages did not allow polygamy to become part of Hindu culture. This was the effort of community. Otherwise, this Court in *Bhaurao* v. *State of Maharashtra,* AIR (1965) SC 1564 observed :

E

> *"Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act, 1955, which made a second marriage of a male Hindu, during the lifetime of his previous wife, void."*

F 19. Therefore, if a second marriage did take place, children born of such marriage, provided it was not otherwise invalid, were not illegitimate and in the matter of inheritance, they had equal rights.

20. In every community, unfortunately, there are people who exploit even the smallest of liberties available under law and it is at this stage that G the law intervenes to discipline behaviour. Various States. therefore, passed their separate, though almost similar, laws relating to marriages by Hindus restricting the number of wives to only one by providing specifically that any marriage during the lifetime of the fist wife would be void.

H 21. There is no dispute that Mr. Raman was a 'Nair' and belonged

to Malabar Tarwad family. The personal law by which he was governed was the Marumakattayam Law of Malabar comprising of a body of judicially recognised customs and usages, which prevailed among a considerable section of the people inhabiting the West Coast of South India. The essential difference between Marumakattayam and other schools of Hindu law was that the Marumakattayam school was founded on the matriarchate while others are founded upon the agnatic family. In the Mitakshara joint family the members claim through descent from a common ancestor, but in a Marumakattayam family, which is known as the Tarwad, the descent is from a common ancestress. Mr. Sundara Ayyar, who was a Judge of the Madras High Court, has already written an excellent treatise on the customary laws of Malabar which has been recognised as an authoritative work by the Privy Council in *Kochunni* v. *Kuttanunni,* AIR (1948) PC 47. This Court had also had an occasion to refer to broad aspects of this law in a few decisions (See : *Balakrishna Menon* v. *Asstt. Controller of Estate Duty,* AIR (1971) SC 2390 and *Venugopala Ravi Verma* v. *Union of India,* AIR (1969) SC 1094, *Achuttan Nair* v. *C. Amma,* AIR (1966) SC 411. In a recent decision in *Padmavathy Amma* v. *Ammunni Panicket,* AIR (1995) SC 2154 = [1995] Supp. 3 SCC 352, it was indicated that :

> "In the Marumakkathayam system of law succession to property is traced through females, though the expression Marumakkathayam strictly means inheritance by sister's children. It is because of this that a man's heirs are not his sons and daughter, but his sisters and their children - the mother forming the stock of descent and inheritance being traced through mother to daughter, daughter's daughter and so on. A Marumakkathayam family is known as a Tarwad and consists of a group of persons, males and females, all tracing descent from a common ancestress. An ordinary Tarwad consists of the mother, her children, male and female, the children of such females and their descendants in the female line, how-low-soever, living under the control and direction of the Karnavan, who is the eldest male member. The junior male members are also proprietors and have equal rights. The Tarwad is thus a typical matriarchal family."

22. Marumakattayam law was modified and altered by Madras Marumukattayam Act, 1932 (XXII of 1933). This Act was in force when Raman Nair married his first wife, Ammu Amma, in 1938. Section 5 of the

A Act provides as under :

> "5(1) During the continuance of a prior marriage which is valid under section 4, any marriage contracted by either of the parties thereto on or after the date on which this Act comes into force shall be void.
>
> B
>
> (2) On or after the said date, any marriage contracted by a male with a marumuakkattayi female, during the continuance of a prior marriage of such male, shall be void, notwithstanding that his personal law permits of polygamy.

C It thus contained a specific prohibition that during the continuance of a prior marriage, any marriage contracted by either of the parties thereto shall be void.

23. But Heart has its own reasons. In spite of the statutory prohibi-
D tion, Raman Nair contracted a second marriage with respondent No. 1 in 1948.

24. The Maramakkattayam Act, 1932 was repealed by Section 7(2) (read with the Schedule) of the Kerala Joint Hindu Family System (Abolition) Act, 1975 (Act 30 of 1976) with effect from 1.12.1976. Obviously with
E the repeal of the Act in 1976, the prohibition in Section 5 that the second marriage would be void, ceased to be operative.

25. Learned counsel for the appellant, therefore, contended that Madras Act XXII of 1933 which contained a prohibition against second marriage having been repealed by the Kerala Joint Hindu Family System
F (Abolition) Act, 1975, the original Hindu law, based on Shastras and scriptures, would revive and consequently Raman's marriage with appellant No. 1 would become valid particularly as the repeal would have the effect of obliterating the Madras Act XXII of 1933 from the Statute Book from its inception as if it never existed. The contentions are without substance
G and deserve immediate rejection, on account of the reasons which we are setting out hereinbelow.

26. Section 7 of the Kerala Joint Hindu Family System (Abolition) Act, 1975 (Act No. 30 of 1976) is reproduced below :

H "7. *Repeal* - (1) Save as otherwise expressly provided in this Act,

any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act. A

(2) The Acts mentioned in the Schedule, in so far as they apply to the whole or any part of the State of Kerala, are hereby repealed." B

27. In the schedule appended to the Act, the Madras Act is mentioned at serial No. 1.

28. Section 4 of the Kerala Interpretation and General Clauses Act provides, inter alia, is under : C

"4. Effect of repeal - Where any Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not - D

(a) revive anything not in force or existing at the time at which the repeal takes effect : or

(b) affect the previous operation of any enactment so repealed or anything duly done of suffered thereunder, or E

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) .. ..

(e) .. .." F

29. In view of these provisions, it is necessary to examine whether a different intention is expressed in the Kerala Joint Hindu Family System (Abolition) Act, 1975 and what actually is the effect of repeal.

30. The provisions of Section 7(2), by which the Madras Act has been repealed, have been quoted above. The repealing Act does not indicate any intention contrary to the provisions contained in the Kerala Interpretation and General Clauses Act which, therefore, will apply with full vigour on the principle that whenever there is a repeal of any enactment, the consequences indicated in Section 4 would follow, unless there was any G H

A saving clause in the repealing enactment of any other intention was expressed therein. In the case of a simple repeal, there is hardly any room for the expression of a contrary view.

31. The instant case, as would appear from a perusal of Section 7(2) of the repealing enactment, is a case of repeal simplicitor. In view of
B Section 4(b) of the Kerala interpretation and General Clauses Act, the previous operation of Madras Act XXII of 1933 will not be affected by the repeal nor will the repeal affect anything duly done or suffered thereunder. So also, a liability incurred under that Act will remain unaffected and will not be obliterated by the repeal as indicated in clause (c)
C of section 4.

32. Raman had contracted a second marriage, in the lifetime of his first wife, in 1948 when Madras Act XXII of 1933 was in force, which prohibited a second marriage and, therefore, the consequences indicated in the Act that such a marriage would be void would not be effected nor
D will the previous operation of the Act be affected by the repeal of that Act. The repeal does not mean that Madras Act XXII of 1933 never existed on the Statute Book nor will the repeal have the effect of validating Raman's second marriage, if it was already a void marriage under that Act.

33. Learned counsel for the appellant then contended that appellant
E Nos. 2 to 6 a shall, for purposes of inheritance, be treated as legitimate sons Section 16 of the Hindu Marriage Act, 1956 and, therefore, their suit ought to have been decreed. He also contended that if benefit of legitimacy cannot be given to the appellants on the ground that Section 16 does not apply to them and applies to those illegitimate children who were
F born of a void marriage performed after the Act came into force, the provisions will have to be struck down as discriminatory and violative of the rule of equality before law contained in Article 14 of the Constitution. We shall examine both the contentions.

34. Whenever an enactment is attacked on the ground of discrimina-
G tion, it becomes the duty of the court to look to the legislation as a whole and to find out why class legislation was introduced and what was the nexus between the classification and the object sought to be achieved by it. In order to decipher this question we have to have a peep into the background.

H 35. Before the enactment of the Hindu Marriage Act, 1955 there

existed General Hindu law, based upon scriptures and Shastras, including their exposition by scholars, which regulated marriages amongst Hindus, There were different customs and usages prevalent in different parts of the country. A

36. In the Malabar area with which we are concerned in the instant case and which now forms part of the Kerala State, there were different customs regarding marriage prevalent among different Groups of people. Local laws were also made regulating marriages among people inhabiting particular local area, as for example, in the Malabar area there was the Madras Marumakkattayam Act (No. XXII of 1933). Section 5 of this Act prohibited a second marriage during the lifetime of a spouse and specifically provided that such a marriage would be void. It laid down as under: B C

> "5. (1) During the continuance of a prior marriage which is valid under section 4, any marriage contracted by either of the parties thereto on or after the date on which this Act comes into force shall be void. D
>
> (2) On or after the said date, any marriage contracted by a male with a marumakkattayi female, during the continuance of a prior marriage of such male, shall be void, notwithstanding that his personal law permits of polygamy. E

37. In the same area, there was the Madras Namboodri Act (No. XXI of 1933) which was applicable to Namboodri Brahmans not governed by Marumakkattayam law of inheritance. This Act also prohibited bigamy but it was only partial prohibition as it was provided by Sections 11 and 12 of the Act as under : F

> "11. No Nambudri who has a Nambudri wife living shall marry another Nambudari woman except in the following cases :
>
> (a) where the wife is afflicted with an incurable disease for more than five years, G
>
> (b) were the wife has not borne him any child within ten years of her marriage,
>
> (c) where the wife has become an outcaste." H

A "12. (1) Any Nambudri male who contracts a marriage in contravention of Section 11 shall be punished with fine which may extend to one thousand rupees, but a marriage so contracted shall not be deemed to be invalid.

B (2) Any person who conducts, directs or abets the performance of any marriage in contravention of section 11 shall be punished with fine which may extend to one hundred rupees."

38. Thus, a second marriage was permissible under certain circumstances enumerated in Section 11. It was also indicated that the second C marriage would not be void. Thus, in the same region, in respect of different groups of people, different laws were made, although both consisted of people professing Hindu religion. This anomaly was removed by repealing Sections 11 and 12 of the Act by Section 8 of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Madras Act VI of 1949) with the result that Section 9 of the Namboodari Act, which provided as under:

D

"9. Notwithstanding any custom or usage to the contrary every major male Nambudri shall, subject to the provisions of section 5 of the Madras Marumakkattayam Act, 1932, and any other law for the time being in force, be at liberty to marry in his own community."

E

became operative with full force and vigour. Since Section 9 was to operate subject to the provisions or Section 5 of the Tamil Nadu (Madras) Marumakkattayam Act, 1932, a Nambudri could not, after deletion of sections 11 and 12, marry a second wife during the lifetime of the first wife.

F

39. The evil of bigamy was sought to be prevented by regional laws made either prior to or after the Constitution of India. Since the attempt of these laws was to introduce social reforms in the community at regional levels, the High Courts, in which the validity of such laws was challenged, G particularly after the enforcement of the Constitution, on the ground of violation of Articles 14, 15 and 25 upheld those laws with the finding recorded in strong terms that the laws were neither discriminatory nor did they infringe Article 25 of the Constitution.

40. The Bombay High Court in *State* v. *Narsu Appa Mali,* ILR (1951) H Bombay 775 = 55 Bombay Law Reporter 779 = AIR (1952) Bombay 84,

rejected the argument that the Bombay (Prevention of Hindu Bigamy Marriage) Act, 1946 discriminated between Hindus and Muslims by enforcing monogamies on Hindus and not on Muslims as the Court was of the opinion that the State was free to embark upon social reforms in stages. It was pointed out by the Court that penalties provided in the Act, which were more stringent than those provided in the Indian Penal Code, were rightly prescribed and were justified on the ground that having regard to the outlook of the Hindus, it may have been considered necessary to impose severer penalties in order to implement the law effectively.

41. The Madras High Court in *Srinivasa Iyer* v. *Saraswathi Ammal,* ILR (1953) Madras 78 = AIR 1952 Madras 193, upheld the validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and held that the Act did not violate Article 15 or 25 and there was no discrimination between Hindus and Mohammedans on the ground of religion.

42. The Full Bench of the Andhra Pradesh High Court in *G. Sambireddy* v. *G. Jayamma,* AIR (1972) A.P. 156 considered both the Bombay and Madras decisions referred to above and held that Sections 11 and 17 of the Hindu Marriage Act, 1955 did not violate Article 15(1) as Sections 5(1), 11 & 17 merely introduced a social reform for the class of persons to whom the Act applied.

43. Parliament consisting of the representatives of the people knew, and the Courts can legitimately presume that it knew, the situation prevailing all over India with regard to the different laws, customs and usages regulating marriages among Hindus and that it further knew their problems and their need for a uniform codified law concerning marriages.

44. It was in this background that Hindu Marriage Act, 1955 was enacted by Parliament to amend and codify the law relating to marriage among Hindus. The Act applies to every person who is a Hindu by religion in any of its forms or developments, indicated in Section 2 thereof, including a person who is a Buddhist, Jain or Sikh by religion. Besides other categories of persons who are to be treated as "Hindus", the explanation appended to Section 2 provides that any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion, shall also be a Hindu. It also provides that any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh and who is brought up as a member of the tribe, group, community or family

to which such parent belongs, will be a Hindu.

45. Other relevant provisions of the Act may also be noticed.

46. Section 4 of the Act provides that the Act shall have an overriding effect. It provides as under :

> "*4. Overriding effect of Act* – Save as otherwise expressly provided in this Act : –
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act:
>
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

47. Conditions for a Hindu marriage are indicated in Section 5 which is quoted below :

> "*5. Conditions for a Hindu marriage* -- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely –
>
> (i) neither party has a spouse living at the time of the marriage;
>
> (ii) at the time of the marriage, neither party -
>
> (a) is incapable of giving a valid consent to in consequence of unsoundness of mind; or
>
> (b) thought capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
>
> (c) has been subject to recurrent attacks of insanity or epilepsy;
>
> (iii) the bridegroom has completed the age of (twenty one years) and the bride the age of (eighteen years) at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usasge governing each of them permits of a marriage between the two; A

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two." B

48. Section 16, as originally enacted, provides as follows :

"*16. Legitimacy of children of void and voidable marriages :*

Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, and child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity : C D

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity 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 possession or acquiring any such rights by reason of his not being the legitimate child of his parents." E

49. Sections 11 and 12 which are referred to in Section 16 above are also quoted below : F

"*11. Void marriages* – Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto (against the other party), be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5." G

"*12. Voidable marriages* – (1) Any marriage solemnized, whether before or after the commencement of this act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely : H

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force or by fraud as to the mature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage -

(a) on the ground specified in clause (c) of sub- section (1), shall be entertained if -

(i) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied :

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act

within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

50. The requirements for the applicability of Section 16 (as originally enacted), which protected legitimacy, were that :

(i) there was a marriage;

(ii) the marriage was void under section 11 or voidable under section 12.

(iii) there was a decree annulling such marriage either under Section 11 or under Section 12.

(iv) the child was begotten or conceived before the decree was made.

51. A marriage would be null and void of it was solemnized in contravention of clauses (i), (iv) and (v) of Section 5. Clause (i) prohibits a marriage if either party has a spouse living at the time of the marriage. Clause (iv) prohibits a marriage if the parties are not within the degrees of prohibited relationship while clause (v) prohibits a marriage between parties who are the 'sapindas' of each other. A marriage in any of the above situations was liable to be declared null and void by a decree of nullity at the instance of either party to the marriage. Section 16 was intended to intervene at that stage to protect the legitimacy of children by providing that children begotten or conceived before the making of the decree would be treated to be legitimate and they would inherit the properties of their parents, though not of other relations.

52. Similarly, a marriage solemnized either before or after the commencement of the Hindu Marriage Act, 1955 was made statutorily voidable if it was found that the husband was impotent at the time of marriage and continued to be so till the institution of the proceedings or that a party to the marriage was either idiot or a lunatic or that the consent of the party to the marriage or that of the guardian required under Section 5 of the

A Act, was obtained by force or fraud or that the girl at the time of marriage was pregnant by some other person. In such a situation, the marriage was liable to be annulled by a decree of nullity at the instance of either party to the marriage. The legitimacy of children of such a marriage was also protected by Section 16 by providing that for purposes of inheritance, the children would be treated to be legitimate and would inherit the properties B of their parents.

53. Now, legitimacy is a matter of status. In *Ampthill Peerage Case (1976) 2 All England Reports 411 (424), HL (Committee for Privileges), Lord Simon of Glaisdale* observed :

C

> "Legitimacy is a status : it is the condition of belonging to a class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their fathers. Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition. Father- D hood, by contrast, is a presumption. A women can have sexual intercourse with a number of men any of whom may be the father of her child; though it is true that modern serology can sometimes enable the presumption to be rebutted as regards some of these men. The status of legitimacy gives the child certain rights both E against the man whom the law regards as his father and generally in society."

54. In an Australian case, Barwick, CJ in *Salemi* v. *Minister for Immigration and Ethnic Affairs,* (1977) 14 ALR 1 (7), stated :

F

> "I cannot attribute any other meaning in the language of a lawyer to the word "legitimate" than a meaning which expresses the concept of entitlement or recognition by law."

55. Illegitimate children, on the contrary, are children as are not born either in lawful wedlock, or within a competent time after its determination. G It is on account of marriage, valid or void, that children are classified as legitimate or illegitimate. That is to say, the social status of children is determined by the act of their parents. If they have entered into a valid marriage, the children are legitimate; but if the parents commit a folly, as a result of which a child is conceived, such child who comes into existence H as an innocent human baby is labelled as illegitimate. Realising this situa-

tion, our Parliament, and we must appreciate the wisdom of the legislators then adorning the seats in the august hall, made a law which protected the legitimacy of such innocent children. This was a bold, courageous and dynamic legislation which was adopted by other advanced countries.

56. The concept of illegitimacy was abolished in New Zealand by the Status of Children Act 1969 (NZ). Under s. 3 of this Act, for all purposes of the law of New Zealand, the relationship between every person and his father and mother is to be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships are to be determined accordingly.

57. In England also, social reforms were introduced to supplement or improve upon the Matrimonial uses Act by enacting Family Law Reform Act, 1969 as also the Family Law Reform Act, 1987 to give limited right of succession to the illegitimate children in the property of their parents on allowing the parents to succeed to the property of their illegitimate children.

58. In spite of the foresightedness of the legislators, the intention of the Parliament could not be fully reflected in the Act which unfortunately suffered at the hands of persons who drafted the Bill and the various provisions contained therein. The results were startling. Since the Rule of Legitimacy was made dependent upon the marriage (void or voidable) being annulled by a decree of annulment, the children born of such marriage, would continue to be illegitimate if the decree of annulment was not passed, which, incidentally would always be the case, if the parties did not approach the Court. The other result was that the illegitimate children came to be divided in two groups; those born of marriage held prior to the Act and those born of marriage after the Act. There was no distinction between these two groups of illegitimate children, but they came to suffer hostile legislative discrimination on account of the language employed therein. Indeed, language is an imperfect instrument for the expression of human thought.

59. The object of Section 16 was to protect legitimacy of children born of void or voidable marriages. In leaving out one group of illegitimate children from being treated as legitimate, there did not appear to be any nexus between the object sought to be achieved by Section 16 and the classification made in respect of illegitimate children similarly situate or

A circumstanced. The provisions of Section 16 were, therefore, to that extent, clearly violative of Article 14 of the Constitution.

60. The legislature, as a matter of fact, committed the mistake of borrowing in this Section the language of Section 9 of the Matrimonial Clauses Act, 1850 made by the British Parliament which dealt with the B legitimacy of children of only voidable marriage and not the children of marriages void *ipso jure*.

61. The defect in the language employed in Section 16 was noticed by some High Courts also. The Madras High Court in *T. Ramayammal* v. C *T. Mathummal,* AIR (1974) (Madras) 321, which was a decision rendered prior to the amendment of Section 16, laid down that unless a decree of nullity was granted in respect of a marriage which was void, the legitimacy of the children born of such marriage would not be protected. The High Court further observed as under :

D "The wording of Section 16 so far as it is relevant to a marriage void under Section 11 leads to an anomalous and startling position which could have hardly been contemplated by the legislature. The position and status of children of void marriage should obviously be the same either the marriage is declared a nullity under Section E 11 or otherwise. It is seen that the legislature has borrowed in this section the language of Section 9 of the Matrimonial Causes Act, 1950 which deals with the legitimacy of children of only voidable marriages and does not refer to children of marriages void *ipso jure* and made the section applicable to cases of both voidable and void marriages annulled by a decree of court. Though the language F of the section is more appropriate to voidable marriages, it has been applied to void marriages as well, presumably with the object of ensuring that where a marriage was in fact solemnised but was void for any of the grounds mentioned in Section 11, the children of such marriage should not be bastardised whether a decree of G nullity is passed or not. But the above obvious intention of the Legislature has not been duly carried out by a proper wording of the section."

62. The High Court was of the opinion that :

H "In view of the language of the section being plain and unam-

biguous, it is not possible for the court to construe the same in different manner having in mind that presumed intention of the legislature even if it appears to be obvious. I am therefore, of the view that this is a casus omissus which the Courts cannot reach for no canon of construction will permit the court to supply what is clearly a lacuna in the statute and it is for the legislature to set right the matter by a suitable amendment of the section."

63. It may also be pointed out at this stage that the Joint Committee which was constituted to look into the provisions of the Hindu Marriage Act, indicated in its Report that in no case should children be regarded as illegitimate and consequently it followed the principles contained in Section 26 of the Special Marriage Act, 1954, to provide that children born of void of voidable marriages shall be treated to be legitimate unlike the English law which holds the child of a voidable marriage alone to be legitimate but not that of a void marriage (See : Section 9 of the Martimonial Clauses Act, 1850).

64. In order, therefore, to give full effect to what was intended to be achieved by enacting Section 16, the Parliament intervened and amended Section 16 by Act No. LXVIII of 1976 pointing out in the Notes to the Clauses of the Bill and the Amending Act, 1976 that :

"this clause seeks to substitute Section 16 so as to clarify the intention and to remove the difficulties in interpretation."

65. The Amended Section 16 is quoted below :

"16. Legitimacy of children of void and voidable marriages. - Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before

A the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

B (3) 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 on 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 C any such rights by reason of his not being the legitimate child of his parents."

66. The question now to be considered is the question relating ot the 'vires' of the Section in its present form, or, to put it differently, if Section 16, as originally enacted, contravened, in any way, Article 14, for the reason D that it discriminated between two groups of illegitimate children similarly circumstanced, does the Section, after its amendment by Act No. LXVIII of 1976 continue to be still violative of Article 14.

67. There is always a presumption that an Act made by the Parlia- E ment or the State Legislature is valid; so also there is a strong presumption in favour of the validity of legislative classification. It is for those who challenge the Act as unconstitutional to show and prove beyond all doubts that the legislature arbitrarily discriminated between different persons similarly circumstanced. This presumption, however, can be displaced by F showing that the discrimination was so apparent and manifest that any proof was hardly required. Section 16, as originally enacted, fell under this category and we have already held that to the extent it discriminated between two groups of illegitimate children in the matter of conferment of status of legitimacy, it was violative of Article 14. The vice or the mischief from which unamended Section 16 suffered has been removed or not is our G next concern.

68. Hindu Marriage Act, 1955 is a beneficent legislation and, therefore, it has to be interpreted in such a manner as advances the object of the legislation. The Act intends to bring about social reforms. Conferment H of social status of legitimacy on a group of innocent children, who are

otherwise treated as bastards, is the prime object of Section 16. A

69. Learned counsel for the appellant tried, at this stage, to invoke Heydon's Rule which is a sound rule of construction of a statute firmly established in England as far back as in 1584 when *Heydon's* case (1584) 3 Co. Rep. 7a was decided that for the true interpretation of all statutes in general, four things are to be discerned and considered : B

(1) what was the common law before the making of the Act,

(2) what was the mischief and defect for which the common law did not provide, C

(3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and

(4) the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy ..... D

70. *Heydon's* rule was approved In *re Mayfair Property Company (1898) 2 Ch 28 (CA)*, wherein Lindley, M.R. observed that the rule was "as necessary now as it was when Lord Coke reported Heydon's case". This rule was also followed by the Earl of Halsbury in *Eastman Photographic* E *Materials Company Ltd.* v. *Comptroller-General of Patents, Designs and Trade- Marks,* (1898) AC 571, 576 (HL) in the following words :

"My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy. These three things being compared, I cannot doubt the conclusion. F

71. *Heydon's* case has also been followed by this Court in a number of decisions, all of which need not be specified here except *K.P. Verghese* G v. *Income-tax Officer, Emakulam and Anr.,* 131 ITR 597 = [1982] 1 SCR 629 = [1981] 4 SCC 173, *Bengal Immunity Co. Ltd.* v. *State of Bihar,* AIR (1955) SC 661 and *M/s. Goodyear India Ltd.* v. *State of Haryana,* AIR (1990) SC 781.

Heydon's Rule is generally invoked where the words in the statute H

A are ambiguous and/or are capable of two meanings. In such a situation, the meaning which avoids the mischief and advances the remedy, specially in the case of a beneficial statute, is adopted. There is some controversy whether Heydon's rule can be invoked in any other situation specially where the words of the statute are clear and unambiguous. In *C.I.T., M.P.* B *& Bhopal* v. *Sodra Devi,* AIR 1957 SC 832, it was indicated that the rule *Heydon's case* is applicable only when the words in question are ambiguous and capable of more than one meaning. That is what was expressed by Gajendragadkar, J. In *Kanailal Sur* v. *Paramnidhi Sadhukhan,* AIR (1957) SC 907. In *Maunsell* v. *Olins,* (1975) 1 ALL ER 16 (HL) p-29, Lord Simon C explained this aspect by saying that the rule in *Heydon's* case is available at two stages; first before ascertaining the plain and primary meaning of the statute and secondly at the stage when the Court reaches the conclusion that there is no such plain meaning.

Be that as it may, we are not invoking the Rule but we have never- D theless to keep in mind the principles contained therein to examine and find out whether the mischief from which the earlier legislation suffered on account of use of certain words has since been removed and whether the subsequent legislation is constitutionally valid and, on account of use of new phraseology, implements effectively the intention of the legislature in E conferring the status of legitimacy on children, who were, otherwise, illegitimate.

72. Keeping these principles in view, let us now proceed to examine the amended provisions of Section 16.

F 73. Section 16 was earlier linked with 11 and 12. On account of the language employed in unamended Section 16 and its linkers with Sections 11 and 12, the provisions had the effect of the dividing and classifying the illegitimate children into two groups without there being any nexus in the statutory provisions and the object sought to be achieved thereby. It is to G be seen whether this mischief has been removed.

74. Section 16(1) begins with a non obstante clause.

75. "*Non Obstante* clause is sometimes appended to a Section in the beginning, with a view to give the enacting part of the Section, in case of H conflict, an over-riding effect over the provision or Act mentioned in that

clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it, will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment." (See : *Union of India* v. *G.M. Kokil,* [1984] Supp. SCC 196 = AIR (1984) SC 1022, *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Gumam,* [1986] 4 SCC 447 (477), *R.S. Raghunath* v. *State of Karnataka,* [1992] 1 SCC 335, *G.P. Singh's Principles of Statutory Interpretation).*

76. The words "*notwithstanding that a marriage is null and void under Section 11*" employed in Section 16(1) indicate undoubtedly the following:

(a) Section 16(1) stands delinked from Section 11.

(b) Provisions of Section 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigour in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contravened.

(c) Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) was amended.

(d) Mischief or the vice which was the basis of unconstitutionality of unamended Section 16 has been effectively removed by amendment.

(e) Section 16(1) now stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy.

Section 16, in its present from, is, therefore not ultra vires the Constitution.

77. Section 16 contains a legal fiction. It is by a rule of *fictio juris* that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable.

A 78. When an Act of Parliament or a State Legislature provides that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not have been so acquired or in existence but for the enactment, the Court is bound to ascertain the purpose for which the fiction was created and the parties between whom the fiction was to
B operate, so that full effect may be given to the intention of the legislature and the purpose may be carried to its logical conclusion, (See : *M/s. J.K. Cotton Spg. & Wvg. Mills Ltd.* v. *Union of India,* AIR (1988) SC 191, *American Home Products Corporation* v. *Mac Laboratories,* [1986] 1 SCC 465 = AIR (1986) SC 137.

C Lord Asquith in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council,* (1952) AC 109 B : (1951) 2 All ER 587 observed that which one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which inevitably have flowed from it - one must not permit his
D 'imagination to boggle' when it comes to the inevitable corollaries of that state of affairs. (See also : *M. Venugopal* v. *Divisional Manager,* LIC (1994) 2 SCC 323.

79. In view of the legal fiction contained in section 16, the illegitimate
E children, for all practical purposes, including succession to the properties of their parents, have to be treated and 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.

F 80. Obviously, appellants 2 to 6 were born prior to the date on which amendments were introduced in Section 16(1), and consequently they would, notwithstanding that the marriage between their parents had taken place at a time when there was a legislative prohibition on the second marriage, be treated as legitimate, and would, therefore inherit the properties of their father, Raman Nair, under Section 16(3) of the Act.

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81. In the result, all the three appeals are allowed. Respondents' Suit No. 38 of 1976 for exclusive possession of certain items of property is dismissed. The other Suit, namely, O.S. No. 39 of 1976 for partition of half share in the tenancy land, filed by the respondents against appellant No. 1
H alone, is also dismissed. It will, however, be open to them to seek such

relief as may be available to them under law. O.S. No. 99 of 1977 filed by appellants is decreed with the finding that the appellant No. 1 being widow and appellant No. 2 to 6 being sons of Raman Nair, are entitled to their share in the properties left by him. It is on this basis that the trial court shall now proceed to complete the proceedings in this suit for partition, Appellants shall be entitled to their costs. A B

V.S.S. Appeals allowed.