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Protecting the rights of illegitimate child under the law

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Abstract

Law act as bridge in harmonizing social and individual interest. Althou each aspect of marriage and issues arising out of marriage has been mentioned under hindu law, but dynamic structure of society has brought various issues to limelight. Some are reluctant to get imbibed by society. The concept of illegitimacy is one of the prominent among them. Althou country doesn't have complete separate code dealing with the concept of illegitimacy but there lies various provisions which tends to protect the rights of illegitimate child. Apart from written code judiciary through judicial activism set forth various pre cedents protecting interest of illegitimate child in every sphere. Detail about the topic has been mentioned in research paper.

Keywords: Status of illegitimate child, legislative position in Hindu law, provision of evidence act, role of judiciary

Introduction

An illegitimate child is a child whose parents were not married to each other at the time of his/her birth ^[1]. A child is said to be 'illegitimate' if one was born to parents who were not married to each other at the time of the birth. The child would still be considered illegitimate even if the child's parents got married after the birth. Though every child need care and protection due to mental and physical vulnerabilities, there is a subcategory of children who might need more warmth, safety, and care than others. Children born from a relationship that is both societal and legally (if proved), condemned to belong to this aforementioned category. One of how these children are protected is through the presumption of legitimacy of a child born during wedlock. This presumption is recognized, in English law and Indian Law ^[2]. This concept is statutorily recognized in the latter. As India is a secular country hosting many different religions, every religion-specific statute has its take on this presumption of legitimacy. Even under these personal codes and regulations, the laws relating to maintenance, property rights, guardianship, etc. also vastly different. Moreover, other than our national laws, International conventions have also played their part in trying to eradicate the social stigma surrounding an illegitimate child, like Article 25 of the United Declaration of Human Rights, the five principles of the Geneva Declaration, the International Covenant on Civil and Political Rights of 1989, etc. ^[3] This paper strives to offer a detailed explanation of the various laws and their stance concerning the legitimacy of a child ^[4].

The concept of illegitimacy could be traced back to Latin era which means not in accordance to law of land. A child born out of the wedlock is considered as legitimate as a relation of appearance ^[5] determined the legitimacy of child therefore an illegitimate child is considered to be nullius filius which basically means having no relationship with their parents. Since illegitimate child had not got true regard in regards to rights as being provided to parent of children ^[6].

In India, prior to the drafting and passing of the Hindu Code Bills and the eventual enactment of Hindu Personal Laws, the people and communities were generally governed by

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¹<http://legal-dictionary.thefreedictionary.com/Illegitimate+children> last visited on September 25, 2022.

²www.lawgicstratum.com last visited on september23, 2022.

³*Ibid*

⁴Janaki Nair, Rights of Illegitimate Children in India, available at: <https://www.lawgicstratum.com/post/rights-of-illegitimate-children-in-india>, last visited on August 8, 2022.

⁵Available at www.ijirt.org last visited on September 22, 2022.

⁶Janice Castelino, A Study on the Property Rights of Illegitimate Children in India, 7, IJIRT(2021).

their own customs, usage, etc.^[7] Therefore, inheritance was governed solely by custom and usage. Hindu women were not permitted to hold and purchase property apart from their “stridhan”, and if any immovable property devolves upon a Hindu woman, she only has life interest in the property and cannot alienate it according to her wishes^[8]. Further, illegitimate children were given no rights of inheritance or maintenance and were treated as outlaws. However, the enactment of the Hindu Code Bill streamlined and codified the laws governing Hindus and by extension, gave certain rights to illegitimate children. Further, through various amendment and precedents, the ambit of rights of illegitimate children have expanded^[9].

Various Rights Recognised for Protection of Basic Rights of Illegitimate Children Includes:-

Indian society has imbibed itself into customary boundaries but still there lies scope of change due to ever changing structure of society and dynamic structure of the legal structure of the society.

1.1 Right of Inheritance

Since ancient times, illegitimate children have been regarded unfairly under the Laws of Inheritance. They were also denied the rights to assert their inheritance against the estate of their parents. As time progressed, the children born outside of wedlock began to obtain certain inheritance rights. These inheritance rights of illegitimate children were restricted when compared to legitimate children^[10]. It depends upon the wishes of any person, whether his or her adult children will inherit his estate as under the law. By executing a will person can bequeath his estate as he desires. However, in certain cases, a person dies without carrying out a testament, the estate is devolves upon the legal heirs of the deceased by the rule of inheritance, and the legitimacy of the child plays vital role at the time of determining the share^[11]. Section 4 of the Hindu Succession Act, 1956, has overriding effects and thus, the personal laws of Hindu's regarding inheritance will not apply and under the Succession Act, because was not a legitimate son. Initially, after the Hindu Marriage Act was passed in the year 1955, the children of a void and voidable marriage became illegitimate. In the event of a void marriage, no declaration by the Court shall be required to declare it null and void. But, if voidable marriage is annulled by a decree of nullity by the Court, then the children become illegitimate^[12].

By way of amendment to Hindu Marriage Act, 1955, the status of legitimacy is conferred only on the children born of the void marriage under Section 11 of Hindu Marriage Act, 1955^[13]. If the marriage is void for the reason other than under Section 11 of the Act, children would be illegitimate

⁷ www.legiteye.com last visited on September 22, 2022.

⁸ *Ibid.*

⁹ Prachi Dutta, *Illegitimate Children and the Law: A Primer on the Rights of Children Born out of Wedlock in India*, Available at: <https://legiteye.com/illegitimate-children-and-the-law-a-primer-on-the-rights-of-children-born-out-of-wedlock-in-india> last visited on August 18, 2022.

¹⁰ Stephanie Kurose, *The Right of Illegitimate Children to inherit the Estate of Their Deceased Father*, Available at : [http:// info.legalzoom.com](http://info.legalzoom.com) [last visited on August 20,2022].

¹¹ *Inheritance Rights for Legitimate and Illegitimate Children*, Available at: [http:// www.hg.org](http://www.hg.org)[Last Visited on August 20,2022]

¹² Anil Kumar Singh, “Legitimacy of Children under Hindu Law: A Critique”, 7, *PIJR* [2018].

¹³ Hindu Marriage Act 1955, S.16

^[14]. In this case, Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh & Anr^[15], the moot question required the Court to determine, whether, after the death of a legitimate son, an illegitimate child could succeed the property left by the Raja. The Court held that the illegitimate son of a Shudra Raja had the right to succeed Raja by virtue of survivorship.

P.E.K. Kalliani Amma & Ors. V. K. Devi & Ors^[16] the Apex Court held that Section 16 of the Hindu Marriage Act, 1955, is not ultra vires of the Constitution of India. The legal fiction was created in this Section, by virtue of which the illegitimate children must be considered as legitimate for all practical purposes, including the succession to the property of their parents. However, on the basis of this law, such children cannot succeed to the properties of any other relatives of their parents. Thus, even by this amendment, only restricted inheritance rights were given to children of void and a voidable marriage.

Revanasiddappa v. Mallikarjun^[17], it was held by honourable court that a child whether it is born out of void or illegitimate child, law would presume him innocent and must not suffer for the act which he has not done so far .and must be eligible for full right of a legitimate children.

Section 16 of the Hindu Succession Act, 1955, the children of void and voidable marriages are declared legitimate by the virtue of legal fiction and the illegitimate children who do not fall within the scope of that Section are not conferred any status of legitimacy under this provision^[18]. Whereas considering the broader interpretation of this section it can be construed that child out of rape or illicit relationship still does not find any place under act.

Issue of Live in Relationship and Illegitimacy of Child.

The ever-changing structure of the society had brought the concept of live-in -relationship to the Indian social terminology. Marriage being a sacramental union under Hindu law, thus as per it the basic requirement for legitimacy of child is marriage but however in the changing social scenario our Indian Judiciary had played a vital role in bringing the laws in favour of child who tends to suffer as result of this/her parent decisions.

In S. P. S Subramayam v. Sruttayan^[19], the Apex court upheld the legitimacy of the children born of live-in relationships. As Hon'ble Supreme Court had ruled, "If a man and woman live under the same roof and live together for a number of years, there was a presumption in law that they were husband and wife and that the children born to them would not be illegitimate."

Similar decision was given by Apex court in Tulsi v. Darghatiya^[20] where it was again held that children born of such relations would no longer be considered as illegitimate. The pre-conditions for a child born of a live-in relationship not to be regarded as illegitimate are that the parents must have lived under one roof and co-habited for a significant period of time for society to accept them as husband and

¹⁴ Suderson V. State, AIR 1988 Del 368.

¹⁵ PC 1890, BOM.

¹⁶ AIR1966 SC 1963.

¹⁷ AIR 2011 (86) ALR 450

¹⁸ Special Leave to Appeal , Available at : [http:// www.livelaw.in](http://www.livelaw.in) [last Visited on September 4, 2022].

¹⁹ AIR 1994 SC 133.

²⁰ AIR 2008 SC 1193.

wife, and "walk in and walk out" relationships would not be considered for it ^[21].

Dimple Gupta v. Rajiv Gupta ^[22], wherein Hon'ble Supreme Court has used its powers to achieve the ends of social justice and held that an illegitimate child born of an illegal relationship is entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973, which provides maintenance to children whether legitimate or illegitimate.

Guardianship

The mother is considered the natural guardian of an illegitimate child and after her, the father is the natural guardian, and in the case of a married girl, the husband is the natural guardian ^[23]. Supreme Court has recently ruled that an unwed single mother in India can be a sole guardian of the child ^[24].

Conceptual Framework under Indian Evidence Act

Section 112 of the Indian Evidence Act, 1872, is based on a well-known maxim *pater est quem nuptiae demonstrant* ^[25]. This maxim means the father whom the marriage indicates. Section 112 of the Indian Evidence Act, 1872 lays down, that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution ^[26] and the mother remains unmarried, it shall be taken as the conclusive proof that it is the legitimate child of that man, unless the person questions it establishes that parties to the marriage had no access to each other at any time when the child could have been begotten. In the light of the presumption of legitimacy in favour of the child provided in this section, the Courts, by decision, upholds the legitimacy of the child unless the facts are too complicated and the father is in a position to produce evidence that the child has at all have been begotten to him and that in such situation, declaration of the legitimacy of the child would cause injustice to the father. This Section has brought justice to all sides. In such like cases, where the ruling of any Court brands a child as a bastard and its mother as an unchaste woman should not be taken lightly and without full proof evidence, such verdict should not be passed ^[27].

The Hon'ble Supreme Court in *GoutamKundu v. State of West Bengal* ^[28] and *Kamti Devi v. Poshi Ram* ^[29] and our Apex Court in both of these cases rejected the request for blood grouping and DNA test made by the husband. Considering, that the rule of evidence of legitimacy is enacted in favour of the child and that the child may be stigmatized as a bastard in the society as a result of a DNA test. With due respect, it is submitted that such decisions cause great hardships to an innocent husband who has not committed any wrong and who is forced to bear the fatherhood of an illegitimate child.

Medical Jurisprudence also suggests that there is a great deal of likelihood that the full span of pregnancy will be

more than 280 days ^[30]. The mother cannot claim the legitimacy of the child if she remains unmarried even after 280 days of the dissolution of marriage, as this does not fall within the scope of Section 112 of the Indian Evidence Act, 1872. However, with the help of DNA test, the legitimacy of the child can be established and disputes over paternity of the child can be resolved ^[31].

Role of Judiciary in Establishing Right

Rameshwari Devi v. State of Bihar ^[32], the Court dealt with a case in which a woman lived with a government employee and also gave birth to an illegitimate child who after the death of the said employee, sought a share in the pension/gratuity and other death-cum-retiral benefits, along with his other children. The claim of the illegitimate child of the deceased employee who born of void marriage was decreed by the court.

ABC v. The State (NCT of Delhi) ^[33] of Apex Court begins by noting the plight of a woman who found that she could not appoint her son as the nominee for her savings and insurance policies. The irony here is, that a woman has enough financial liquidity to have savings, insurance, etc. and is therefore not in dire a need of the man's support to raise her child. She did not even look for the same thing either. In our country, a woman was forced to disclose the identity of the biological father so that identity of the father could be confirmed in the official record. No one knows what role man's name would play in the records to establish that child's legitimacy or identity in society.

Conclusion

There no misconception that despite of wider interpretation of Indian legislation and precedents set by judiciary the concept of illegitimacy still act as stigma in our social culture. Thus time had come to make a complete code so that rights of children born outside wedlock could be protected from being stigmatized by social or ethical norms. Government should look forward to amend the existing laws or enacting all new codes for the young kids who are suffering by social ill-treatment due to their parents.

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²⁶www.kanoon.comlast visited on 25 September 2022.

²⁷Kamti Devi V. Poshi Ram, AIR 2003 SC 2226.

²⁸AIR 1993 SC 2295

²⁹Supra note 17.

³⁰Disputed Paternity and pertinence of DNA testing by Priyanka Munshi, IAvailable at : <http://docplayer.net> (last Visited on September 13,2022)

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