(7) The most serious content of the warrant of authorisation is the name of the person whose premises etc. are sought to be searched. The warrant in this case was admittedly blank in that regard when it was issued under the signature of the Commissioner. The Commissioner has in the instant case acted in my opinion in a more high-handed manner than did the Secretary of State in the case *John Wilkes, esq.* v. *Wood* (supra). I am unable to congratulate the Commissioner for his betraying the confidence reposed in him by the drastic provision of section 132 and throwing all sense of propriety and responsibility to the winds on mere suspicion or pretence.

(8) With these words I agree that the petition should be allowed with costs and we order accordingly.

B.S.G.

APPELLATE CIVIL

Before Pritam Singh Pattar, J.

GURNAM KAUR and another,—*Defendants-appellants.*

versus

PURAN SINGH ETC.,—*Plaintiffs-respondents.*

Regular Second Appeal No. 1314 of 1973.

August 14, 1975.

Hindu Marriage Act (XXV of 1955)—Sections 5(i), 11 and 16—Grant of legitimacy under section 16 to children of a void marriage—Obtaining of a decree of nullity of such marriage—Whether a condition precedent—Such children—Whether entitled to inherit the property of their parents.

Held, that the obtaining of a decree of nullity of a void marriage under section 11 of the Hindu Marriage Act, 1955 is a condition precedent to the grant of legitimacy under section 16 of the Act to the children of such a marriage begotton or conceived before the decree. If a decree of nullity of such a marriage is passed then the children begotton or conceived before the decree are to be deemed to be legitimate children who would be entitled to inherit the property of their parents. However, if a decree of nullity has not been passed under

section 11 of the Act, then the provisions of section 16 cannot be invoked to legitimise the children of a void marriage. (Para 10).

Regular Second Appeal from the decree of Shri R. L. Lamba, Additional District Judge, Hissar dated the 27th day of August, 1973, affirming that of Shri Ved Parkash, Sub-Judge III Class, Sirsa, dated the 13th May, 1971, granting the plaintiffs a decree for possession of 1/5th share of land measuring 319 kanals 19 marlas as detailed and described in the heading of the plaint situated in village Panjmala, Tehsil Sirsa left by Ram Singh, son of Mahla Singh by a declaration that the plaintiff and defendant No. 3 are the heirs of said Ram Singh, deceased and the mutation No. 393, sanctioned on 19th December, 1965, in favour of defendants No. 1 and 2, where they are shown respectively as widow and daughter of Ram Singh, deceased is void and not binding on the plaintiffs and the defendant No. 3.

Both the Courts left the parties to bear their own costs.

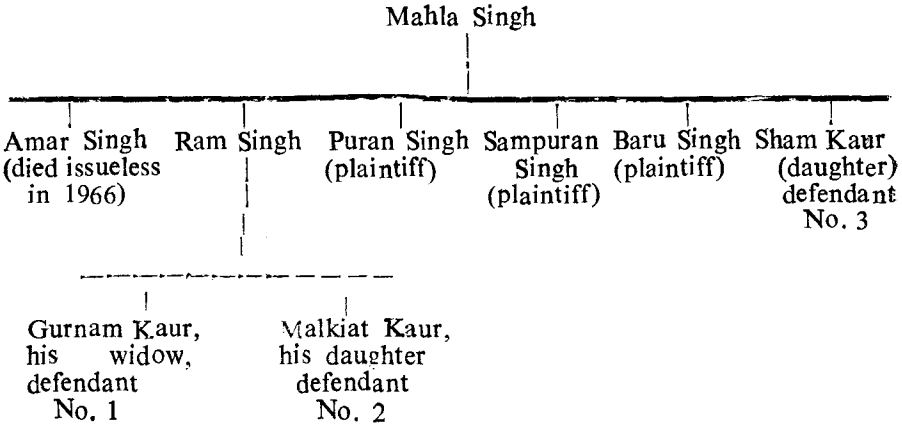
Maluk Singh, Advocate, with N. S. Kamboj, Advocate, *for the appellants.*

Jagdish Singh, Advocate, *for the respondents.*

JUDGMENT

PATTAR, J.—(1) This is a regular second appeal filed by Gurnam Kaur and another, defendants-appellants, against the judgment dated August 27, 1973, of the Additional District Judge, Hissar, whereby he dismissed the appeal filed by them and confirmed the decree of the trial Court.

(2) The following pedigree table will be useful in understanding the facts of this case:—



Mahla Singh was the owner of land measuring 319 Kanals and 19 Marlas fully described in the plaint and situated in the area of village Panjmala, Tehsil Sirsa, District Hissar, and on his death this land was inherited by his five sons in equal shares. It appears that his daughter Sham Kaur, defendant No. 3, did not succeed to this land. Ram Singh, son of Mahla Singh, died on or about the year 1962 and his one-fifth share in this land was mutated by the revenue authorities in the names of Gurnam Kaur, defendant No. 1, and Malkiat Kaur, defendant No. 2, who were alleged to be the widow and daughter respectively of the deceased. Amar Singh, son of Mahla Singh, died in the year 1966, before the filing of the present suit in the year 1968. Puran Singh, Sampuran Singh and Baru Singh, plaintiffs, filed civil suit for the possession of one-fifth share of this land belonging to their brother Ram Singh, on the allegations that Gurnam Kaur, defendant, was the wife of one Balwant Singh, who is still alive, that she never married Ram Singh deceased, that her marriage with Ram Singh, during the life time of her previous husband Balwant Singh was void, and that Malkiat Kaur, defendant, is not the daughter of Ram Singh. It was, therefore, alleged that Gurnam Kaur and Malkiat Kaur were not entitled to inherit the property of Ram Singh and the mutation was wrongly sanctioned by the revenue authorities in their names and that they were entitled to succeed to the property of Ram Singh.

(3) Malkiat Kaur, defendant, was minor at the time of the filing of the suit and Gurnam Kaur, defendant, acted as her guardian-ad-litem. Gurnam Kaur in her written statement admitted that previously she was married to Balwant Singh, who turned her out of his house and thereafter she contracted *Karewa* marriage with Ram Singh, according to the custom prevalent among the Jats and her marriage with Ram Singh was valid and that Malkiat Kaur was born to her from the loins of Ram Singh, during the wedlock and the mutation was rightly attested by the revenue authorities in their names and there is no merit in the suit and it may be dismissed. On these pleadings of the parties, the following issues were framed by the trial Court:—

(1) Whether defendant No. 1 performed *Karewa* validly with Ram Singh deceased, if so its effect ?

(2) Whether the defendant No. 2 is the daughter of Ram Singh ?

(3) If issue No. 2 is proved then whether Gurnam Kaur defendant is governed by custom in matters of Karewa marriage and if so what that custom is ?

(4) Whether the suit is within limitation ?

(5) Relief.

(4) The learned Subordinate Judge held that Gurnam Kaur did not perform any valid Karewa marriage with Ram Singh and that Malkiat Kaur was not the legitimate daughter of Ram Singh and he decided issues Nos. 1 and 2 against the defendants. He held that no alleged custom of Karewa was proved and he decided issue No. 3 also against the defendants. The suit was held to be within time and he decided issue No. 4 in favour of the plaintiffs. As a result, the suit of the plaintiffs was decreed. Feeling aggrieved Gurnam Kaur and Malkiat Kaur, defendants, filed an appeal against that decree in the Court of the District Judge, which was finally heard by the Additional District Judge. The learned Additional District Judge affirmed the decision of the trial Court on all the issues and dismissed the appeal with no order as to costs. Thereafter Gurnam Kaur and Malkiat Kaur filed this second appeal.

(5) It is undisputed that Gurnam Kaur, defendant-appellant, was married to one Balwant Singh of village Mallan, Tehsil Muktsar, District Ferozepur, and she resided at his house as his wife for about 20 years and thereafter she was deserted by him. The learned Additional District Judge, Hissar, after discussing the admissions made by Gurnam Kaur, defendant, in her written statement and also the evidence of the parties, decided that she was deserted by Balwant Singh in the year 1956 and thereafter she allegedly contracted Karewa marriage with Ram Singh and from his loins she gave birth to Malkiat Kaur, defendant-appellant No. 2. Ram Singh died in the year 1962. He further found that no custom of Karewa as alleged by the defendant was proved and that if there was any such custom of Karewa it stood abrogated by the provisions of section 4 of the Hindu Marriage Act, 1955, which came into force with effect from 18th May, 1955. The Additional District Judge affirmed the decision of the trial Court on issues Nos. 1, 2 and 3.

(6) Mr. Maluk Singh, the learned counsel for the appellants, did not contest the decision of the lower appellate Court on these

issues. However, he argued that assuming that the marriage of Gurnam Kaur with Ram Singh was void and that Malkiat Kaur was not the legitimate daughter of Ram Singh, even then she (Malkiat Kaur) is entitled to inherit the property of Ram Singh in view of the provisions of section 16 of the Hindu Marriage Act. To discuss this contention of the learned counsel, I set out below the relevant provisions of the Hindu Marriage Act, 1955 (hereinafter called the Act.)

Section 5 of the Act reads as follows:—

"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) * * * * * * *.

(iii) * * * * * * *".

Section 11 of the Act runs as under:—

"Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, 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".

Section 16 of the Act lays down:—

"Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotton 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:

.....

....."

(7) It is admitted that Gurnam Kaur contracted Karewa marriage with Ram Singh during the life-time of her husband

Balwant Singh, after the coming into force of the Hindu Marriage Act, 1955. The marriage of Gurnam Kaur with Ram Singh was, therefore, void and thus Malkiat Kaur is not the legitimate daughter of Ram Singh. The contention of Mr. Maluk Singh is that according to the provisions of section 16 of the Act, Malkiat Kaur is to be deemed to be the legitimate daughter of Ram Singh and Gurnam Kaur and, therefore, she is entitled to inherit the property of Ram Singh. In support of this contention he relied on *Banshidhar Jha* v. *Chhabi Chatterjee* (1). The facts of this case were that Smt. Chhabi Chatterjee married with Banshidhar Jha on 21st July, 1962, by exchanging garlands in a temple according to the customary right as also by the petitioner putting varmilion on her forehead. Since then she claimed to have lived with him as his lawfully wedded wife and gave birth to the girl on 23rd May, 1963, at Katihar Hospital. She made an application under section 488, Criminal Procedure Code, 1898, for maintenance for herself and for the maintenance of her infant daughter against her husband in the Court of the Sub-Divisional Magistrate of Purnea (Bihar). The respondent-husband denied her allegations and pleaded that the infant girl was not his child nor was Chhabi Chatterjee his wife. He averred that he had already a lawfully married wife under Hindu Law since 1952 and in view of the provisions of the Hindu Marriage Act, 1955, the marriage if any with Chhabi Chattejee was void *ab initio*, and, therefore, she was not entitled to any maintenance under section 488, Criminal Procedure Code. The Sub-Divisional Magistrate accepted the application and ordered Banshidhar Jha to pay Rs. 30 per mensem for the maintenance of his wife Chhabi Chatterjee and Rs. 20 per mensem for the maintenance of his infant daughter. Against this order, Banshidhar Jha filed a revision petition in the Patna High Court. The only point for decision before the High Court was whether the marriage of Chhabi Chatterjee with Banshidhar Jha was valid or void and whether she was entitled to any maintenance. The High Court came to the conclusion that no evidence was produced to show whether Banshidhar Jha had any lawfully wedded wife living on the date of his marriage with Chhabi Chatterjee in 1962 and if the answer to this question was in the affirmative then his marriage with Chhabi Chatterjee was void and she was not entitled to any maintenance as his wife under section 488, Criminal Procedure Code. However, if the answer to the question was in the negative then the

(1) A.I.R. 1967 Patna 277.

marriage of the parties was valid and she was entitled to maintenance at the rate allowed by the Magistrate. As a result, the impugned order of Magistrate relating to the maintenance allowed to Chhabi Chatterjee was set aside, and the case was remanded to the Magistrate to determine the question whether the marriage of Banshidhar Jha and Chhabi Chatterjee was valid. There was no contest before the High Court regarding the maintenance payable to the minor daughter, because according to section 488, Criminal Procedure Code, 1898, even an illegitimate child is entitled to get maintenance from his father. The question whether the illegitimate child of a void marriage was to be deemed to be legitimate for purposes of section 16 of the Hindu Marriage Act was not involved in that case. Therefore, this decision of the Patna High Court does not help the appellants.

(8) As against this Mr. Jagdish Singh, learned counsel for the respondents, relied on *Thulasi Ammal* v. *Gowri Ammal* and others (2). The facts of that case were that one Periasami married Kannu Ammal during the subsistence of a valid marriage with his first wife, who was alive. From his loins, the second wife Smt. Kannu Ammal gave birth to a daughter. After the death of Periasami, the property was inherited by his first wife. The second wife and her minor daughter from the loins of Periasami filed a suit for a declaration of title and for recovery of possession of half the estate of Periasami. The trial Court held that the marriage of Smt. Kannu Ammal with Periasami was void by reason of section 5(1) read with section 11 of the Hindu Marriage Act, and, therefore, she was not entitled to inherit the property of her husband and her suit was dismissed. However, the suit of the daughter was decreed. An appeal against this decree was filed by the defendants and the same was dismissed. The defendants, who were the first widow and her minor son, then filed an appeal in the Madras High Court. This appeal was accepted by the learned Single Judge holding that the provisions of section 16 of the Hindu Marriage Act did not help the minor daughter from the second wife as a decree of nullity had not been obtained under section 11 of the Act and the appeal was accepted and the decree passed by the lower Court in favour of the minor daughter from the second wife was set aside. Against this judgment the daughter born of void marriage of Periasami with

(2) A.I.R. 1964 Madras 118.

Kannu Ammal filed letters patent appeal, which was dismissed by a Division Bench, and it was held as follows:—

> "Section 16, Hindu Marriage Act, clearly contemplates the case where a decree of nullity is granted in respect of any marriage under section 11 or section 12. It is only in such an event that any child begotton or conceived before the decree is made shall be deemed to be a legitimate child born of that marriage notwithstanding the decree of nullity. But where a decree of nullity has not been obtained, no part of the section can be invoked for the purpose of legitimatising an issue born of such a void marriage."

To the same effect was the law laid down in *Gowri Ammal and another* v. *Thulasi Ammal and another* (3). The law laid down in these decisions is aptly applicable to the facts of this case. In view of the law laid down in these cases, Malkiat Kaur appellant cannot succeed to the property of Ram Singh as no decree of nullity of marriage was obtained under section 11 of the Act. In order to bring a case under section 16 of the Act, the factum of the void marriage between the parents of the child is to be proved, and it must be shown that a decree of nullity has been granted in respect of that marriage under section 11 of the Act, and that the child was begotton or conceived before the passing of the decree of nullity. In the instant case, the Karewa marriage of Ram Singh with Gurnam Kaur has not been proved. It is also admitted that no decree of nullity of that void marriage under section 11 of the Hindu Marriage Act has been obtained and consequently there is no force in the contention of the learned counsel for the appellants and it must be rejected.

(9) Section 16 of the Hindu Marriage Act helps the children of a void marriage in respect of which decree of nullity has been obtained under section 11 of the Act, and the children begotton or conceived prior to that decree are to be deemed legitimate children, who are entitled to succeed to the property of their parents. Section 16 does not deal with the legitimacy of the children of a void marriage where a decree of nullity has not been obtained. According to this section the children born of a void marriage would be legitimate children of the parents if a decree of nullity has been granted in respect of

(3) A.I.R. 1962 Madras 510.

that marriage under section 11 of the Act and they would be illegitimate children if no such decree has been obtained. This is anomalous and startling position which could hardly have been contemplated by the legislature. This is a lacuna in the Act which can only be rectified by the legislature.

(10) The legal position, therefore, is that the obtaining of a decree of nullity of a void marriage under section 11 of the Hindu Marriage Act is a condition precedent to the grant of legitimacy under section 16 of that Act to the children of such a marriage begotton or conceived before the decree. If a decree of nullity of such a marriage is passed then the children begotton or conceived before the decree are to be deemed to be legitimate children who would be entitled to inherit the property of their parents. However, if a decree of nullity has not been passed under section 11 of the Act, then the provisions of section 16 cannot be invoked to legitimise the children of a void marriage.

(11) In the instant case the Karewa marriage between Ram Singh and Gurnam Kaur appellant has not been proved and no decree of nullity under section 11 of the Act was obtained and consequently section 16 of the Act does not apply and the contention of the learned counsel for the appellants is rejected as devoid of force.

(12) No other point was urged. There is no force in this appeal and the same is dismissed. There will be no order as to costs.

B.S.G.

APPELLATE CIVIL

Before M. L. Verma, J.

MRS. MARGARET A. SKINNER,—*Appellant.*

versus

M/S. EMPIRE STORE CONNAUGHT PLACE, NEW DELHI-1, ETC.,—*Respondents.*

Execution First Appeal No. 252 of 1973.

August 14, 1975.

Code of Civil Procedure (V of 1908)—Section 73 and Order XXI, Rule 90—High Court Rules and Orders, Volume I, Chapter 12-L—Rule 20(i)—Punjab Land. Revenue Act (XVII of 1887)—Section