

**Khuman and Another Vs. Barelal and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/498104](http://sooperkanoon.com/498104)

**Court :** Madhya Pradesh

**Decided On :** Oct-16-2000

**Reported in :** I(2001)DMC186; 2001(1)MPHT83

**Judge :** Mr. R.B. Dixit, J.

**Acts :** [Hindu Succession Act, 1956](#) - Sections 3(1) and 8; [Hindu Marriage Act, 1955](#) - Sections 16

**Appeal No. :** Second Appeal No. 437/96

**Appellant :** Khuman and Another

**Respondent :** Barelal and Others

**Advocate for Def. :** Shri A.K. Shrivastava, Adv.

**Advocate for Pet/Ap. :** Shri B.D. Baraiya, Adv.

**Disposition :** Appeal Dismissed

**Judgement :**

**R.B. Dixit, J.**

1. The short question involved in this appeal, is about status of illegitimate son in the self acquired property of deceased father.

The facts found proved in the present case are as under:

2. Deceased Sarua had kept as wife, deceased plaintiff Khema Bai, from whom, appellant was born. Khema Bai was residing separate from married wife of Sarua, from whom, defendant Barelal was born.

3. During his life time, Sarua had partitioned his agricultural holding between himself and his son Barelal and appellant. The dispute arose between the parties after the death of Sarua regarding agricultural land, which fell to the share of deceased. Defendant/respondent No. 1 Barelal got mutation of the disputed land in his name after death of his father and also claimed it on the basis of 'will' Ex. D-1. However, appellant brought a suit for declaration and cancellation of mutation for partition claiming 1/3rd share in the suit property challenging 'will' as fake and false and further claimed the suit land on the basis of an oral 'will' by deceased Sarua in his favour.

4. The learned Trial Court decreed the suit while in first appeal, the learned Appellate Court allowed the appeal and reversed the judgment and decree of the Trial Court, against which, plaintiff/appellant has come up in this second appeal, which has been admitted on the following substantial questions of law:

(i) Whether, after long cohabitation between deceased Sarua and plaintiff Khema Bai, there is a presumption of marriage between Khema Bai and same ?

(ii) Whether, after the death of Sarua, the plaintiffs are entitled for 1/3rd share in the suit property

5. So far as findings of first Appellate Court are concerned, regarding Khema Bai being kept as wife the learned counsel for the appellants had failed to point out any illegality or perversity therein. It is not disputed that married wife of Sarua was alive when mother of appellant was kept as mistress by the deceased. There is no pleading to the effect that there was any custom in the community of the parties for marrying a second wife, when, first married wife was alive. In the circumstances, no presumption of valid marriage, can be drawn on the basis of long cohabitation when his first wife was alive.

6. Since, the first Appellate Court, had arrived at a conclusion that the oral 'will' is neither permissible nor found proved in the present case, and the learned counsel for the appellant has also failed to point out any infirmity in the conclusion drawn by the first Appellate Court, it is immaterial to go into the details of evidence, in respect of any oral 'will' in favour of plaintiff/appellant.

7. The learned counsel for the appellant has relied upon the decision of Apex Court, in the case of *Badri Prasad v. Dy. Director Consolidation*, reported in AIR 1978 SC 1557, wherein, it has been pointed out that where for 50 years, a man and a woman are living as husband and wife, strong presumption arises in favour of wedlock.

8. In the case of *Maharsai Dani v. Thakuri Lagna*, reported in 1978 MPLJ 507 of this Court, it has been observed that normally, a woman lives with a man only after lawful marriage. Concubinage is an exception and where a man and woman live together as husband and wife and have been treated as such, by the relations and in the society, in which, they live, there is strong presumption about their being lawfully married. The presumption is no doubt rebuttable and may be rebutted by positive evidence to show that the woman started living with the man as a concubine or that there being some legal or other impediment to marriage lawful union was improbable. In such a case, it would be necessary for the party asserting the marriage to prove it by direct evidence of usual ceremonies of marriage but otherwise the presumption is enough.

8-A. Learned counsel for the respondents on the other hand relied upon a decision of this Court in the case of *Reshamlal v. Balwant Singh*, reported in 1994 MPLJ 446, where it was pointed out that neither Hindu Law nor Hindu religion conferred legitimacy to the offspring of a relationship created otherwise than by marriage. Children of such relationship did not get even the social respect. What has not been approved and accepted by the society so long cannot be said to have been forced upon the society by the [Hindu Succession Act, 1956](#). By abolishing polygamy the Parliament did not intend to encourage illegitimacy. The high standard of virtue cannot be said to have been given up. The word 'son' has not been defined in [Hindu Succession Act, 1956](#) but every word need not be defined

in the statute itself. The General Clauses Act defined 'son' and includes only the 'adopted son'. In case, the illegitimate son was also included within this definition, the corresponding amendment would have been made in the definition given in the General Clauses Act.

9. In another decision of this Court in the case of Ramkali v. Mahila Shyamwati and others, reported as 2000(3) MPHT 514 = AIR 2000 Madhya Pradesh 288, where there was no proof of solemnisation of marriage and there is further no proof that there was a de jure marriage or even a defacto marriage where during long cohabitation as husband and wife with habit and repute a child is born, there can be no occasion whatsoever for making available the statutory presumption envisaged under Section 16 of the [Hindu Marriage Act, 1955](#) securing the status of a legitimate child in favour of such a child born out of a union which was either void ab initio or declared to be so under a decree passed under Section 11 or 12 of the [Hindu Marriage Act, 1955](#). Hindu Succession Act does not expressly equate illegitimate children to legitimate children. In the matter of inheritance and succession, the two did not stand at par but stand apart. The Act in terms separates and distinguishes the two and excludes illegitimates from any right to intestate succession except to the extent expressly enacted in the proviso to Section 3(1)(j) of the Act.

10. Now coming to the facts of the present case, it has come in evidence that Khema Bai started living with Sarua when first married wife was alive and also that the husband to whom, Khema Bai was previously married, was also alive. In the circumstances, even the long co-habitation of Khema Bai with Sarua would not confer status of legal wife to her and a son begotten of such a co-habitation being illegitimate had no right to inherit the property of deceased. Since it has also been established that the property in dispute was self acquired property of the deceased, in the circumstances, he could bequeath the same in favour of even an illegitimate son. However, the alleged oral will in favour of plaintiff was neither admissible nor established by evidence. The plaintiff/appellant therefore, is not entitled to claim remaining disputed property either by way of inheritance or through such a moral 'will'.

11. In the written 'will' (Ex. D-1) of the deceased, it has been specifically mentioned that he had already allotted 38 Bighas of agricultural land and a portion of his house to the plaintiff and the equal share of land and house, was given to defendant Barelal. Remaining 30 Bighas of land, which deceased kept for himself was meant to be given to any one who will serve him or else it will go to his elder son Barelal. This being a self acquired property of the deceased, shall automatically pass to the respondent/defendant Barelal in accordance with the 'will' referred hereinabove.

12. In the result, substantial question Nos. 1 and 2 are answered in the following terms:

'No presumption of valid marriage can be drawn merely on the basis of long co-habitation between deceased and plaintiff Khema, particularly when, first wife of Sarua and husband of Khema Bai to whom, she was previously married, were alive.'

In the circumstances, the plaintiffs are not entitled for any share in the property left by the deceased.

13. For the reasons stated hereinabove, this appeal fails and is dismissed accordingly.

14. Second Appeal dismissed.