

**Savitri Devi and ors. Vs. Shanti Devi**

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**Court :** Delhi

**Decided On :** Mar-19-1990

**Reported in :** 41(1990)DLT323; II(1990)DMC438

**Judge :** D.P. Wadhwa, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 1, Rule 10

**Appeal No. :** Interim Appeal No. 2932 of 1987 and Suit No. 197 of 1982

**Appellant :** Savitri Devi and ors.

**Respondent :** Shanti Devi

**Advocate for Pet/Ap. :** K.R. Gupta,; Deepak Kumar,; S.K. Taneja and;

**Judgement :**

**D.P. Wadhwa, J.**

(1) This application under Order 1, Rule 10 and Section 151 of the Code of Civil Procedure has been filed in the suit for declaration pending since 1982. The plaintiffs in the suit are three in number. The plaintiffs seek a declaration that release deed dated 15th May, 1968, executed by late Shri Charan Kumar in favor of his mother, the defendant, is invalid and that the plaintiffs have shares in the property subject matter of the release deed. The first plaintiff is the wife of deceased Shri Charan Kumar and plaintiffs 2-3 are respectively the son and

daughter of late Shri Charan Kumar, both these plaintiffs being minor. It is stated that the property was an ancestral property in the hands of Shri Charan Kumar and could not be subject matter of any release deed. The first plaintiff claims to be owner of 1/8th share of the property and plaintiffs 2 and 3 respectively 5/8th and 1/8th thereof. Various issues were framed in the suit and one of the issues being whether the suit property was ancestral as alleged by the plaintiffs and further whether the release deed executed by Shri Charan Kumar in favor of his mother, the defendant, was void and if so what would be the respective share of the parties. Before the parties could go for trial on the issues, the present application has been filed.

(2) The applicants, numbering five, claim to be the heirs of Shri Charan Kumar; being his wife and four minor children; three daughters and one son. The applicants state that they have direct interest in the suit property. They say that Shri Charan Kumar was living separately from the plaintiffs since 1965 and had, in fact, divorced the first plaintiff, his wife, and thereafter he married the first applicant in this application, namely, Smt. Rakhi Kumar on 14th November, 1967 and four children were born to the parties respectively on 14th October, 1969, 16th January, 1971, 2nd December, 1972 and 16th May, 1974, the son being the youngest of the children. It is also stated that at the time of death, Shri Charan Kumar was living with the applicants and in the ration card he was shown as head of the family with the applicants as the members of his family. Then, the applicants state the reason for delay in moving their application.

(3) On notice being issued, the plaintiffs have opposed the application. The stand taken by the defendant is, however, more or less neutral. The plaintiffs in their reply state that the first applicant Smt. Rakhi Kumar was never married to Shri Charan Kumar and that she is professing Christian religion and could not have married Shri Charan Kumar and particularly when his first wife, the first plaintiff, was living and had not been divorced at the time of death of Shri Charan Kumar.

(4) It appears that the relations between Shri Charan Kumar and the first plaintiff were not cordial and there were various proceedings including that of divorce pending between them at the time of death of Shri Charan Kumar. The first plaintiff

had also initiated proceedings under Section 488 of the Criminal Procedure Code, 1898. It is stated that in these proceedings Shri Charan Kumar had denied his having married the first applicant, Smt. Rakhi Kumar. The applicants State that this stand was taken by Shri Charan Kumar in order to save himself from the charge of bigamy. The fact that the first applicant Smt. Rakhi Kumar was Christian on the day when, she says, she married Shri Charan Kumar is not denied, but it is stated that she embraced Hinduism after the marriage. She also changed her name from Mary Joseph to Smt. Rakhi Kumar after her marriage with Shri Charan Kumar. Children of this marriage are Ms. Renu Kumar, Ms. Monika Kumar, Ms. Dimple and Master Goldy Kumar.

(5) Admitted position, therefore, is that Shri Charan Kumar had a legally wedded wife living at the time of his death. He left no Will. He could not have lawfully married the first applicant. The question thus arises if the applicants have any locus to be impleaded as parties in the present suit.

(6) Shri Suresh Gupta, learned counsel for the applicants, referred to Section 16 of the Hindu Marriage Act, 1955 ('the Act' for short) to contend that even if the marriage between Shri Charan Kumar and the first applicant was null and void, the children of the marriage were, nevertheless, legitimate and they were thus, in any case, the heirs of Shri Charan Kumar and entitled to succeed to his property. Sub-section (1) of this section, which is relevant, may be extracted :-

'(1)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, 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.'

Under Section 11, a marriage solemnized in contravention of the conditions specified in clause (1)-of Section 5 shall be null and void. Section 5 specifies the conditions for Hindu Marriage. This, of course, is to be read with Section 7, which refers to the ceremonies for a Hindu marriage. A marriage may be solemnized between any two Hindus if the conditions set out in Section 5 are fulfilled and the

first condition is that neither party has a spouse living at the time of the marriage. This condition for a Hindu marriage to be valid, will come into play only when solemnized between two Hindus. The Act does not recognise any marriage which is not between two Hindus. Reference was then made to Explanation to Section 2 of the Act which is as under :-

'THE following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be : (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion; (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.'

Reliance was placed on Explanation (b) to contend that applicants 2 to 5, being the children of Shri Charan Kumar and Smt. Rakhi Kumar, the first applicant, were Hindus. Section 2 of the Act deals with its application. The Act was enacted to amend and codify the law relating to marriage among Hindus. The Act not only applies to Hindus by birth or religion, i.e., to converts to Hinduism but also to a large number of other persons.

(7) As noted above according to Explanation (b) to Section 2 any child, legitimate or illegitimate, one of whose parents is a Hindu by religion and who is brought up as a Hindu is a Hindu. I may note here that Section 2 in this Act is the same as in the Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and the Hindu Succession Act, 1956. There is Explanation (b) in Section 2(1) of the Adoptions and Maintenance Act, 1956 which brings into its fold a child brought up as a Hindu, Buddhist, Jain or Sikh, whether legitimate and illegitimate and who has been abandoned both by his father and mother and whose parentage is not known.

(8) If that was the position what has been contended by the applicants, I would have no hesitation in allowing their application and impleading them as the defendants in view of the decision of the Supreme Court in Razia Begum v. Sahebzadi Anwar Begum & Ors. : [1959]1SCR1111. But, then that is not the

correct position in law. Section 4 of the Christian Marriage Act, 1872 states that every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of Section 5 of that Act and any such marriage solemnized otherwise than in accordance with such provisions shall be void. An. exception to the provision of law as made in Section 4 above can be if such a marriage is solemnized under the Special Marriage Act, 1954. It is nobody's case that the marriage between Shri Charan Kumar and Smt. Rakhi Kumar was solemnized in accordance with the provisions of Section 5 of the Christian Marriage Act, 1872 or under the provisions of the Special Marriage Act, 1954. Section 16(1) of the Act, on which reliance has been placed by the applicants, would apply only if there was a marriage between two Hindus in accordance with ceremonies for a Hindu marriage as mentioned in Section 7 of the Act and which is in contravention of any of the conditions specified in clause (i). (iv) and (v) of Section 5 making that marriage a void marriage. It is not the case here. The marriage between Shri Charan Kumar, a Hindu, and the first applicant, a Christian, could not, therefore, have been solemnized under the Act. That being so. Section 16 of the Act becomes inapplicable.

(9) Reference was made to a decision of the Supreme Court in Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav & Anr. : 1988 CriLJ793 . In this case the question was whether a Hindu woman who was married after coming into force of the Act to a Hindu male having a living lawfully wedded wife can maintain an application for maintenance under Section 125 of the Code of Criminal Procedure, 1973. The Court held that such a marriage being complete nullity in the eye of law, an application under Section 125 of the Code of Criminal Procedure could not be maintained by such a woman. Referring to Section 16 of the Act the Court observed that while the legislature considered advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. This judgment of the Supreme Court cannot be made use of in the proceedings before me as Section 16 of the Act becomes applicable when the marriage, though void, is between two Hindus. Since, the marriage in the present case could not have been solemnized under the Act, it is unnecessary for me to examine if the marriage was solemnized in accordance with Section 7 of the Act. Reference to the decision of the Supreme

Court in Bhaurao Shankar Lokhande & Anr. v. The State of Maharashtra & Anr. MR 1965 Sc 1564 which dealt with the question of ceremonies connected with a Hindu marriage under the Act is also not relevant.

(10) Shri K.R. Gupta, learned counsel for the plaintiffs, relied upon a bench decision of the Madras High Court in M. Muthayya v. Kamu alias Kamala Ammal & Ors. : (1981)1MLJ107 . In this case the question was whether there was a valid marriage between the parties at any time. The suit was filed by the first plaintiff claiming that she was married to one M. Muthayya as the second wife and her two daughters, plaintiffs No. 2 and 3, were the children born out of the said wedlock. The first defendant was the first wife of M. Muthayya and the second defendant their son. It was held that there was no evidence to show that there was any form of marriage gone through at any time between the plaintiff and M. Muthayya so that one could draw the inference that there was a marriage, even though the marriage may or may not be valid. The court relied upon the decision of the Supreme Court in Bhaurao Shankar Lokhande's case (supra). Then, reference was made to Section 16 of the Act by the plaintiffs. The court held that the section would have scope for application only if there was solemnisation of marriage at any time as in that case the court had held that there was no proof of solemnisation of marriage, there was absolutely no scope for invoking Section 16 of the Act. But, as noted above, I have not gone into the question of solemnisation of marriage at all as had the parties been Hindus, I would have left this question to be determined in the suit after having impleaded the applicants as parties. Shri K.R. Gupta said that the first applicant could, in any case, claim no right whatsoever in the estate of deceased Shri Charan Kumar and the other applicants, who were illegitimate children of Shri Charan Kumar, could claim only right of maintenance. He appears to be right in this submission. Reference may be made to Chapter-111 of the Hindu Adoptions and Maintenance Act, 1956 dealing with maintenance. Section 21 falling under this Chapter defines 'dependants' which means the relatives of the deceased and this includes his or her minor illegitimate son, so long as he remains a minor and his or her illegitimate daughter, so long as she remains unmarried. Section 22 of this Act provides for maintenance of dependants. Sub-sections (1), (2) and (3) are relevant and are set out as under :-

'(1)subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased. (6) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act to maintenance from those who take the estate. (3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.'

Section 24 of this Act provides that a person who ceases to be a Hindu by conversion to another religion shall not be entitled to claim maintenance.

(11) Since, the applicants are claiming their right to the estate of the deceased Shri Charan Kumar it would be useful to refer to the relevant provisions of the Hindu Succession Act, 1956. As noted above, under Explanationn (b) to Section 2 of this Act any child, legitimate or illegitimate and one of whose parents is a Hindu and who is brought up as a Hindu would be a Hindu. Under Section 3(f) 'heir' means any person, male or female, who is entitled to succeed to the property of an intestate under this Act and under Section 3(j) 'related means related' by legitimate kinship. There is a provision to this clause and which reads as under ;-

'PROVIDED that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.'

Succession under the Hindu Succession Act, 1956 is thus based on the principle of family relationship permitted by law as the words 'legitimate kinship' will indicate. If reference is made to Section 18 of this Act, it will be seen that heirs related to an intestate by full blood are to be preferred to heirs related to half blood, if the nature of the relationship is the same in every other respect. Exception to this general rule can be seen to have been provided to an extent by sub-sections (1) and (2) of Section 16 of the Hindu Marriage Act, 1955 where children born to a mother, though a Hindu, who is not legally married under the Act are treated as legitimate children of the parents. But, then under sub-section (3) of

that Section their right to succeed is confined to the properties only of their parents.

(12) Now, assuming that the property involved in the suit was coparcenary property, as alleged by the plaintiffs the interest of the deceased Shri Charan Kumar shall devolve by intestate succession under the Act and not by survivorship. Section 8 of the Act gives general rules of succession in the case of males dying intestate. The property of such a male Hindu firstly devolves upon the heirs being the relatives specified in Clause (1) of the Schedule. Here the relatives would mean who are related by legitimate kinship and these relatives are son, daughter, widow mother etc. Thus, the plaintiff's and the defendants in the suit would be entitled to succeed to the properties of Shri Charan Kumar to the exclusion of every other person or heir. The provisions regarding succession in the case of a female Hindu are different and these are mentioned in Sections 15 and 16 of the Act, but these are not relevant for my purpose. It was submitted by Shri Suresh Gupta, learned counsel for the applicants, that why should the applicants 2 to 5, who are children of deceased Shri Charan Kumar, suffer for no fault of them. Answer to this submission can be found in the observation of the Supreme Court in Yamunabai's case (supra) and which is as under :-

'LASTLY it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.'

(13) Accordingly, I hold that since the applicants have no right to share in the property of deceased Shri Charan Kumar, dying intestate, they would be strangers to the suit and have thus no right to be impleaded as parties. The application is rejected. There will be no order as to costs.

