

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 213 of 2009****Judgment reserved on 18/01/2021****Judgment delivered on 16/02/2021**

Savitri Jaiswal, Aged 57 years, D/o Late Shri Biharilal Jaiswal, R/o Dayalbanda, Bilaspur, Tahsil and District Bilaspur, Chhattisgarh.

---Appellant/Plaintiff

Versus

1.a. Smt. Saroj Jaiswal, Aged 30 years, Wd/o Late Shri Sanjay Jaiswal.

b. Ky. Sweeti Jaiswal, Aged 9 years, Minor D/o Late Shri Sanjay Jaiswal.

c. Babu, Aged 6 years, Minor S/o Late Shri Sanjay Jaiswal.

d. Gudiya, Aged 3 years, Minor D/o Late Shri Sanjay Jaiswal.

From 1.b. to 1.d. through mother Smt. Saroj Jaiswal Guardian-ad-litem, Wd/o Late Shri Sanjay Jaiswal, R/o Dayalbanda, Bilaspur, Tahsil and Distt. Bilaspur, Chhattisgarh.

2. Shri Vijay Jaiswal, Aged 30 years, S/o Late Shri Bajrang Prasad Jaiswal.

3. Ajaya Jaiswal, Aged 22 years, S/o Late Shri Bajrang Prasad Jaiswal.

4. Jai Jaiswal, Aged 20 years, S/o Late Shri Bajrang Prasad Jaiswal.

5. Mrattunjaya Jaiswal, Aged 18 years, S/o Late Shri Bajrang Prasad Jaiswal.

6. Smt. Meera Devi, Aged 64 years, Wd/o Late Shri Bajranjg Prasad Jaiswal.
 7. Smt. Tara Devi, Aged 65 years, Wd/o Late Shri Biharilal Jaiswal.
 8. Shri Rameshwar Prasad Jaiswal, Aged 42 years, S/o Late Shri Biharilal Jaiswal.
 9. Smt. Alka Jaiswal, Aged 45 years, Wd/o Late Shri Mohanlal Jaiswal.
 10. Rahul Jaiswal, Aged 25 years, S/o Late Shri Mohanlal Jaiswal.
 11. Ratan Bihari Jaiswal, Aged 20 years, S/o Late Shri Mohanlal Jaiswal.
- All R/o Dayalband, Bilaspur, Tahsil and Distt. Bilaspur, Chhattisgarh.
12. State of Chhattisgarh, through the Collector, Bilaspur, Distt. Bilaspur, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:- Mr. M.D. Sharma, Advocate
For Respondents 1 to 5	:- Mr. Shaktiraj Sinha, Advocate
For Respondent 6	:- Mr. Manoj Paranjpe and Mr. Anurag Singh, Advocates
For Respondents 7 to 11	:- Ms. Meena Shastri, Advocate
For State	:- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on

15/07/2015 by formulating the following substantial question of law :-

"Whether the findings of both the courts below are perverse as per the provisions contained in Section 16 of the Hindu Marriage Act, 1955 ?"

[The parties will hereinafter be referred to as per their status given and ranking shown before the trial Court.]

2. The suit property situated bearing Khasra Nos. 27/1 area 1.84 acres and 26/5 area 1.04 acres admeasuring 2.88 acres in total situated at Village Chatidih, Bilaspur was originally owned by Biharilal Jaiswal.
3. It is admitted position on record that Bhagwantin Bai was the legally wedded wife of Biharilal Jaiswal with whom he had one son namely Bajrang Prasad. Defendants No. 1 to 5 are the sons of Bajrang Prasad and defendant No. 6 is the widow of Bajrang Prasad.
4. It is the case of the plaintiff that she is also the daughter of Biharilal Jaiswal, born out of his relationship with her mother defendant No. 7 Tara Devi and as such, being the daughter of Biharilal Jaiswal, she is also entitled for 1/3rd share in the suit property along with the

defendants and injunction be granted restraining the defendants and in alternative, defendants No. 1 to 3 be restrained from alienating the suit property.

5. Resisting the suit, defendants No. 1 to 6 filed their written statement and categorically pleaded that defendant No. 7 was the mistress/dasta wife of Biharilal Jaiswal, as such, no marriage was ever solemnized between Biharilal Jaiswal and defendant No. 7 Tara Devi, and the fact that Biharilal Jaiswal also executed a Will deed dated 18/09/1964 (Ex. D/1C) in favour of defendants No. 7 to 11 in which it has categorically been pleaded that defendant NO.7 is dasta wife of Biharilal Jaiswal, it was pleaded by defendants No. 1 to 6 that plaintiff has no right, title and interest over the suit property and the suit deserves to be dismissed.
6. Learned trial Court, upon consideration of pleadings of the parties, framed as many as 10 issues and after appreciation of oral and documentary evidence on record, dismissed the suit vide judgment and decree dated 27/10/2007 holding that the suit property, being the self-acquired property of Biharilal Jaiswal, only

defendants No. 1 to 6 are his successors and defendants No. 7 to 11 are not successors and Biharilal Jaiswal had executed a Will deed dated 18/09/1964 in favour of defendant No. 7, but plaintiff is his illegitimate daughter and therefore, she is not entitled to inherit his property.

7. On appeal being preferred by the plaintiff, learned first appellate Court affirmed the judgment and decree of the trial Court and vide impugned judgment and decree dated 13/10/2008, dismissed the appeal of the plaintiff against which this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff in which sole substantial question of law has been formulated and set out in the opening paragraph of the judgment.

8. Mr. M.D. Sharma, learned counsel for the appellant/plaintiff, would submit that both the Courts below are absolutely unjustified in holding that plaintiff is the illegitimate daughter of Biharilal Jaiswal and she would not succeed to the property of Biharilal Jaiswal ignoring Section 16 of the Hindu Marriage Act, 1955, which is absolutely perverse, as such, the

judgment and decree passed by both the Courts below deserves to be set aside and the second appeal deserves to be allowed. He would rely upon the decisions rendered by the Supreme Court in the matters of Bhaurao Shankar Lokhande & Anr. v. State of Maharashtra¹, P.E.K Kalliani Amma v. K. Devi² and Union of India v. V.R. Tripathi³.

9. Mr. Shaktiraj Sinha and Mr. Manoj Paranjpe, learned counsel for respondents No. 1 to 6, would submit that both the Courts below have concurrently held that no marriage was ever solemnized between Biharilal Jaiswal and defendant No. 7 Tara Devi, therefore, plaintiff born out of their illicit and adulterous relationship and being the illegitimate daughter of Biharilal Jaiswal would not succeed to the suit property originally owned by Biharilal Jaiswal which is a pure and simple finding of fact based on evidence available on record. They would also submit that there is no pleading at all contained in the plaint and also there is no evidence on record with regard to the fact that at any point of time, marriage of defendant No.

1) AIR 1965 SC 1564

2) AIR 1996 SC 1963

3) AIR 2019 SC 666

7 was solemnized with Biharilal Jaiswal, therefore, Section 16 of the Hindu Marriage Act would not attract and even though plaintiff is the illegitimate daughter of Biharilal Jaiswal, but she would not be the legitimate daughter for the purpose of Section 16 of the Hindu Marriage Act, as such, the finding recorded by both the Courts below in this regard holding the plaintiff to be the illegitimate daughter of Biharilal Jaiswal and as such, she would not inherit his property is based on correct appreciation of facts and law available on record. They would further submit that against the finding of the trial Court holding the plaintiff to be the illegitimate daughter of defendant No. 7 born out of her illicit relationship with Biharilal Jaiswal, cross-objection was preferred before the first appellate Court which has been dismissed by order dated 13.10.2008 and even before this Court, cross-objection was filed by defendants No. 7 to 11 which has also been rejected by this Court vide order dated 19/08/2020, as such, the findings recorded by both the Courts below holding that plaintiff, being the illegitimate daughter of Biharilal Jaiswal, has no right in

the property of Biharilal Jaiswal, has become final and the instant second appeal deserves to be dismissed.

10. Ms. Meena Shastri, learned counsel for defendants No. 7 to 11, would submit that the Will deed dated 18/09/1964 (Ex. D/1C) has not been proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 and even otherwise, the finding recorded by both the Courts below that plaintiff is the illegitimate daughter of Biharilal Jaiswal is contrary to the facts and law available on record, as such, the instant appeal deserves to be allowed.

11. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

12. The suit property is the self-acquired property of Biharilal Jaiswal is an admitted position on record which has also been found by both the Courts below. The plaintiff claims to be the daughter of Biharilal Jaiswal born out of his wedlock with defendant No. 7 Tara Devi. It is also admitted position on record that Bhagwantin

Bai was the legally wedded wife of Biharilal Jaiswal with whom he had one son namely Bajrang Prasad and defendants No. 1 to 6 are the legal heirs of Bajrang Prasad. It is the case of defendants No. 1 to 6 that defendant No. 7 Tara Devi was the mistress/dasta wife of Biharilal Jaiswal and their marriage was never solemnized, as such, plaintiff being the illegitimate daughter of Biharilal Jaiswal with defendant No. 7, would not inherit the suit property.

13. Learned trial Court framed issues No. 2 and 6 and upon consideration reached to the conclusion that the marriage of defendant No. 7 was never solemnized with Biharilal Jaiswal and out of their illicit relationship plaintiff was born, as such, plaintiff is the illegitimate daughter of Biharilal Jaiswal and therefore, she would not succeed to the property of Biharilal Jaiswal and that finding was affirmed by the first appellate Court. The sole substantial question of law formulated in this second appeal is based on Section 16 of the Hindu Marriage Act, 1955.

14. At this stage, reference may be made to Section 16 of the Hindu Marriage Act, 1955, which states as under :-

"16. Legitimacy of children of void and voidable marriages – (1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been illegitimate 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.

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

(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 or 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 any such rights by reason of his not being the legitimate child of his parents."

15. By enacting Section 16 of the Act, the legal fiction created by legislature is that children, though illegitimate, shall nevertheless be treated as legitimate, notwithstanding that marriage was void or voidable. The legal fiction specifically intended by legislature to bring about a social reform and as such intention in

amending Section 16 of the Act is to avoid bastardizing a child born out of void/voidable marriage and to confer the status of legitimacy to an innocent child who should not suffer for the mistake of their parents.

16. A focused glance of the above-stated provision contained in sub-section (1) of Section 16 of the Hindu Marriage Act would show that children born out of marriage which is void under Section 11 would be legitimate, but as per sub-section (1) they can inherit their parents. Section 16(1) of the said Act can apply only if marriage is void under Section 11 of the said Act. Section 11 of the Hindu Marriage Act, 1955 reads as under :-

"11. Void marriages. - Any marriage solemnised 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."

It is clear on the reading of above-stated provision that it will apply to marriages that are solemnized after the commencement of the Hindu Marriage Act, 1955. Thus, Section 16(1) of the Act will not assist children born of all void marriages as noticed herein-above. Section

11 provides and concerns only marriages solemnized after the commencement of the Hindu Marriage Act w.e.f. 18/05/1955.

17. The Madras High Court, in the matter of **Subbaraya Pillai alias Subbaraya Manthiri & Anr v. Lakshmiammal & Ors.**⁴ Held that as per sub-section (1) of Section 16 of the Hindu Marriage Act, 1955, only if marriage is null and void under Section 11 of the Act, any child of such marriage can be treated as legitimate. It was further held that Section 11 of the Act applies only to marriages solemnized after commencement of the Act. Hence, Section 16 will apply only to marriages which took place after the Act came into force in 1955 and not to prior marriages.

18. Therefore, in order to get advantage of Section 16(1) of the Hindu Marriage Act, 1955, it must be pleaded and proved by the person seeking to have the benefit -

(i) that marriage has been solemnized between the parties and he/she is a child born from such marriage, and

4 (1993) 2 L.W. 559

(ii) that such marriage has been solemnized after coming into force of the Hindu Marriage Act w.e.f. 18/05/1955.

19. In the matter of P.E.K. Kalliani Amma (supra), Their Lordships of the Supreme Court have held that in view of legal fiction contained in Section 16 of the Hindu Marriage Act, 1955, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate.

20. In the recent pronouncement, the Supreme Court in the matter of V.R. Tripathi (supra) held that child born out of second marriage is legitimate and entitled for grant of compassionate appointment. It was held by their Lordships as under :-

"13. In sub-section (1) of Section 16, the legislature has stipulated that a child born from a marriage which is null and void under Section 11 is legitimate, regardless of whether the birth has taken place before or after the commencement of Amending Act 68 of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences. Hence, though the marriage may be null and void, a child who is born from the marriage is nonetheless treated as legitimate by sub-section (1) of Section

16. One of the grounds on which a marriage is null and void under Section 11 read with clause (i) of Section 5 is that the marriage has been contracted when one of the parties had a spouse living at the time of marriage. A second marriage contracted by a Hindu during the subsistence of the first marriage is, therefore, null and void. However, the legislature has stepped in by enacting Section 16(1) to protect the legitimacy of a child born from such a marriage. Sub-section (3) of Section 16, however, stipulates that such a child who is born from a marriage which is null and void, will have a right in the property only of the parents and none other than the parents."

21. 1. As such, the plaintiff/appellant herein, in order to claim the benefit of Section 16(1) of the Hindu Marriage Act, was required to plead and establish that her mother i.e. defendant No. 7 Taradevi's marriage was solemnized with Biharilal Jaiswal and that too, after coming into force of the Hindu Marriage Act w.e.f. 18/05/1955. In the plaint, plaintiff did not plead either of the fact of marriage between them or it was solemnized after 18/05/1955. The key paragraph of the plaint states as under :-

"4. यह कि वादिनी स्व. बिहारी लाल की पत्नी तारादेवी के गर्भ से बिहारीलाल द्वारा उत्पन्न हुई पुत्री है | तथा प्रतिवादी क्रं. 8 रामेश्वर उर्फ रमेश कुमार बिहारीलाल का तारादेवी के गर्भ से उत्पन्न पुत्र है | तथा दूसरा पुत्र स्व. मोहनलाल था जिसकी मृत्यु सन 1993 में हो चुकी है | वादिनी, रामेश्वर उर्फ रमेश एवं मोहनलाल से बड़ी है | प्रतिवादी क्र. 9 अलका जायसवाल, स्व. मोहनलाल की पत्नी तथा प्रति. क्र. 10 राहुल, प्रति. क्र. 11 रतनबिहारी, मोहनलाल का पुत्र है जो मोहनलाल की मृत्यु के पश्चात उसके चलाचल संपत्ति के उत्तराधिकारी है |"

19.2. Plaintiff (Savitribai-P.W. 1) in her statement under Order 18 Rule 4 of CPC has stated that she was born in the year 1952 which reads as under :-

“2. यह कि मेरी माँ तारादेवी, बिहारीलाल की विवाहिता पत्नी है, वह दासता या रखैल नहीं है, तारादेवी के गर्भ से मैं सन 1952 में पैदा हुई, मेरे पश्चात् तारादेवी के गर्भ से मेरे पिता बिहारीलाल के रामेश्वर और मोहनलाल 2 पुत्र पैदा हुए मैंने अपना स्कूल सर्टिफिकेट पेश किया है ।”

19.3. Plaintiff's mother namely Taradevi Jaiswal i.e. defendant No. 7, though did not aver about her marriage with Biharilal Jaiswal in her written statement, but in the affidavit filed under Order 18 Rule 4 of CPC she has stated that her marriage was solemnized with Biharilal Jaiswal in the year 1948. Paragraphs 1 and 3 of her affidavit states as under :-

“1. यह कि हम जायसवाल कलार जाती के हिन्दू हैं मेरे सन 1948 में बिहारीलाल जायसवाल बिलासपुर के साथ अग्नि के 7 फेरे के साथ 'सप्तपदी' पूर्वक ब्राह्मण द्वारा मंत्र पाठ हवन पूर्वक हुआ था मेरे पति बिहारीलाल जी ने मेरे मांग (शिर) में सिन्दूर भर कर फेरे (भांवर) के साथ विवाह किया था बिहारीलाल जी और मैं पति-पत्नी थे ।

3. यह कि मेरे गर्भ से बिहारीलाल की पुत्री वादिनी सावित्री का जन्म सन 1952 में हुआ फिर रामेश्वर और मोहनलाल नाम के दो पुत्र बिहारीलाल के हुए ।”

As such, it is on plaintiff's own showing that marriage of her mother was solemnized with Biharilal in the year 1948 and she was born in the year 1952 and consequently, Section 11 of

the Hindu Marriage Act would not be applicable so also Section 16(1) of the Act.

22. 1. Except as noticed herein-above, there is no pleading and proof brought on record to hold that at any point of time, marriage of defendant No. 7 Taradevi was ever solemnized with Biharilal Jaiswal and on that account, both the Courts below have concurrently recorded the finding. The Madhya Pradesh High Court in a series of judgments has clearly held that in case of no proof of solemnization of marriage between the parties, Section 16(1) of the Hindu Marriage Act would not be applicable which may be noticed herein profitably.

20.2. In the matter of Ramkali v. Mahila Shyamwati⁵, the Madhya Pradesh High Court dealt with Section 16 of the Hindu Marriage Act and held that when there is no proof of solemnization of marriage and there is further no proof that there was a de jure marriage or even a de facto marriage where during a 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 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 passed under Section 11 or 12 of the Hindu Marriage Act. It was further held that the condition precedent for making such a presumption of legitimacy envisaged under Section 16 of the Hindu Marriage Act is that there must be either a de jure or de facto marriage.

20.3. Similarly, in the matter of Reshamlal Baswan v. Balwant Singh Jwalasingh Punjabi⁶, the question as to whether the illegitimate son is not a 'son' for the purpose of Section 8 read with the schedule to the Hindu Succession Act, 1956 has been dealt with and Gulab C. Gupta, J. speaking for the Madhya Pradesh High Court has clearly held that in those cases where there is no proof of solemnization of marriage, Section 16 of the Hindu Marriage Act is not attracted. Paragraphs 4, 6 and 8 of the judgment state as under :-

“4. Marriage Laws Amendment Act, 1976 provided legitimacy to children of a

marriage hit by Section 11 of Hindu Marriage Act. Section 11 provides a procedure for getting a marriage declared void if it contravenes one of the conditions of Section 5 of the said Act. The conditions under which a marriage is said to be void are those mentioned in clauses (i), (iv) and (v) of Section 5 of the said Act. Marriage between parties having a spouse living at the time of marriage is hit by this provision. This provision has been interpreted to mean that there must be a marriage, which would be hit by the provisions of this Act and would not cover a relationship resulting from any other arrangement than the marriage. That is the reason why it has been held in *M. Muthayya v. Kamu and Ors.*, AIR 1981 NOC 172, that in those cases where there is no proof of solemnisation of marriage, the provision in Section 16 is not attracted. The two courts, in the instant case have found that there was no marriage of any type between respondent Jhunjhibai and the deceased Baswan and hence, it will have to be held that even if Baswan had died after 1976, the benefit of Section 16 of Hindu Marriage Act would not have been available to the appellant. That appears to be the reason why the learned counsel for the appellant did not seriously press the question as framed by this Court.

6. The decision of Bombay High Court in *Laxmibai's case* (*supra*), of course, supports the contention advanced by the learned counsel for the appellant. The question for consideration of the court was the impact of Section 16(1) and 16(3) of the Hindu Marriage Act read with the provision of Section 8 of the Hindu Succession Act. It has already been noticed that Section 16 deals with the offsprings of marriage, which is void. The Court was of the opinion that 1976 amendment of the Hindu Marriage Act takes away and eclipses general rule that the offspring of a marriage, which is null and void *ipso jure* is illegitimate. According to the Court, this was common law

doctrine, inevitably resulting in the effect of bastardising children and has been superseded by this provision. Considering the effect of this amendment, in the context of Section 8, clause (a) of the Hindu Succession Act, the Court held that illegitimate children now given legitimacy would be included within the meaning of 'son' and 'daughter' in the Schedule to the Hindu Succession Act. The Court, therefore, held that though the lady would not be the widow, her sons and daughters would be included within the meaning of the term in Section 8 read with the schedule. A close reading of this decision would indicate that it was the effect of 1976 amendment of Section 16 of the Hindu Marriage Act that made the difference. If the said amendment had not been there or any particular case was not governed by the said amendment, the learned Judge would not have decided in the same manner. Since 1976 amendment does not apply to the facts and circumstances of the case before this Court, this judgment cannot be of any help to the appellant. In fact, *Dadu v. Raghunath*, AIR 1976 Bombay 176, is the case before the amendment and holds on a detailed consideration of provisions, that illegitimate sons even of a Sudra would not be included within the meaning of the word 'son' or 'daughter' appearing in Schedule to Hindu Succession Act. Learned Judge had noticed that before 1956, legitimate children of a Sudra had enjoyed the status of an heir and, therefore, it observed surprisingly that an otherwise dynamic legislation should have extinguished the intestate succession rights of illegitimate sons of Sudras. Regrettable it may be, but since it was intended, it should be accepted as our national discipline. Sentiments howsoever strong cannot justify transgressing the limits of judicial discipline. This being a direct case on the point should, if at all, conclude the matter.

8. Then, it is also not correct to say that the word 'son' has not been defined

anywhere. It has, of course, not been defined in the Hindu Succession Act, 1956, but every word need not be defined in the statute itself. The General Clauses Act defines 'son' and includes only the adopted son. In case the illegitimate son was also included within this definition, a corresponding amendment would have been made in the definition given in the General Clauses Act. "

20.4. In the matter of **Khuman v. Barelal**⁷, again the Madhya Pradesh High Court relied upon its earlier two decisions noticed herein-above and held as under in paragraphs 8A and 9 :-

"8A. Learned counsel for the respondents on the other hand relied upon a decision of this Court in the case of Reshamlal Vs. 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 Vs. Mahila Shyamwati and others, reported as 2000(3) MPHT 514 =

⁷ 2001(1) MPLJ 39

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."

23. Reverting to the facts of the present case in light of the aforesaid legal position, it is quite vivid that it is admitted position on record that Bhagwantin Bai was the legally wedded wife of Biharilal Jaiswal and out of their wedlock they were blessed with a son namely Bajrang Prasad and defendants No. 1 to 6 are the legal heirs of Bajrang Prasad but Biharilal Jaiswal had developed illicit relationship with defendant No. 7 Tara Devi and out of their relationship, the plaintiff was born. Plaintiff in her plaint has nowhere

pleaded that there was marriage solemnized between Biharilal Jaiswal and defendant No. 7 though defendant No.7 in her statement made under Order 18 Rule 4 of the CPC, she has claimed that marriage was solemnized between them, but in fact, there is no pleading at all in her written statement filed before the trial Court that marriage of defendant No. 7 with Biharilal Jaiswal was ever solemnized

24. The two Courts below, after evaluation of material and evidence available on record, have recorded a categorical and a firm finding that the marriage of defendant No. 7 (mother of the plaintiff) with Biharilal Jaiswal was never solemnized, as such, plaintiff is the illegitimate daughter of Biharilal and the presumption under Section 16 of the Hindu Marriage Act would not attract and plaintiff, having being born out of an illicit relationship between Biharilal Jaiswal and defendant No. 7, would not succeed to the suit property originally owned by Biharilal Jaiswal by virtue of Section 16(1) of the Hindu Marriage Act. Even otherwise, if the pleading of plaintiff and defendant No. 7 is taken as correct, then also,

the marriage of defendant No. 7 (plaintiff's mother) is said to have been solemnized with Biharilal Jaiswal in the year 1948 and that too, prior to coming into force of the Hindu Marriage Act on 18/05/1955, therefore, Section 11 of the Hindu Marriage Act would not be applicable as also Section 16(1) of the Act. Consequently, plaintiff is not entitled to claim benefit of Section 16(1) of the Hindu Marriage Act, as such, the finding recorded by both the Courts below holding that though plaintiff is the illegitimate daughter of Biharilal Jaiswal born out of his illicit relationship with defendant No. 7, therefore, she would not succeed the suit property is a pure and simple finding of fact based on evidence available on record which is neither perverse nor contrary to the record. I do not find any illegality or perversity in the said finding.

25. The second appeal, being devoid of merits, deserves to be and is accordingly dismissed.

26. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge