

A bad case of male bias and judicial inconsistency has appeared in *Surjit Kaur vs Garja Singh and others*, reported at All India Reporter (AIR) 1994 Supreme Court (SC) 135. Decided by a bench of two judges on October 27, 1993, this case creates a potentially dangerous situation of legal uncertainty for many Hindu, Sikh, Jain and Buddhist women in India. The implications of such a decision for Indian women need to be addressed.

The details of the case can be quickly summarised. It is a simple, almost everyday case, a property dispute, quite familiar in modern India. A certain Gulaba Singh had died in 1969, leaving behind no offspring. A woman by the name of Surjit Kaur claimed to be his rightful wife. As his widow, she prepared to take over his property. However, she was prevented from doing so by Sifigh's male relatives who claimed to be the rightful heirs, producing dubious evidence of a will in their favour. In addition, most relevant for us here, they insisted that Surjit Kaur had no rightful claim to the property since she had not been validly married to the deceased.

This case illustrates the problems that arise due to Section Seven of the Hindu Marriage Act of 1955. This Act has time and again proved to be an ideal tool for unscrupulous litigants. Usually these are men who seek to avoid a prosecution for bigamy, who want to evade payment of maintenance, or, as in this case, seek to defeat a widow's claim to inheritance. It particularly affects women who remarry after a divorce, or after the death of their first husband.

For some strange reason, many

LAW

Widow's Right to Property

Prejudices Against Remarried Women

○Werner Menski

lawyers do not want to accept what most Indians know very well: in such situations it is customary not to have the full marriage rituals performed as done for a first marriage. In fact, in some situations it will be customary to have virtually no marriage rituals at all. There are many cases in which a man and a woman simply contract to marry, and whether this is done in writing or not is immaterial. In the case of *Surjit Kaur and Singh*, some *gur* (Gaggery) was

distributed to friends of the newly married couple. There was thus public recognition of the marriage and, in addition, the marriage was registered.

A legal presumption of marriage in such situations is a well known concept in the personal laws of India. In this case, however, the higher courts refused to accept such evidence of simple marriage solemnisation. Why then, did the lower courts recognise the same marriage as valid? The Supreme Court declared an absence of proof that the ceremonies required by custom had been followed to the last detail. Surely, this demanded an unnecessarily strict burden of proof?

Sub-section One of Section Seven simply lays down that Hindus can create a valid marriage by performing the customary rites and ceremonies of either party to the marriage. Of course, what is customary depends on a variety of social facts, different from case to case. Sub-section Two provides that: "Where such rites and ceremonies include the *saptapadi* (the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken." Clearly, the wording of these sections confirms that it is perfectly possible

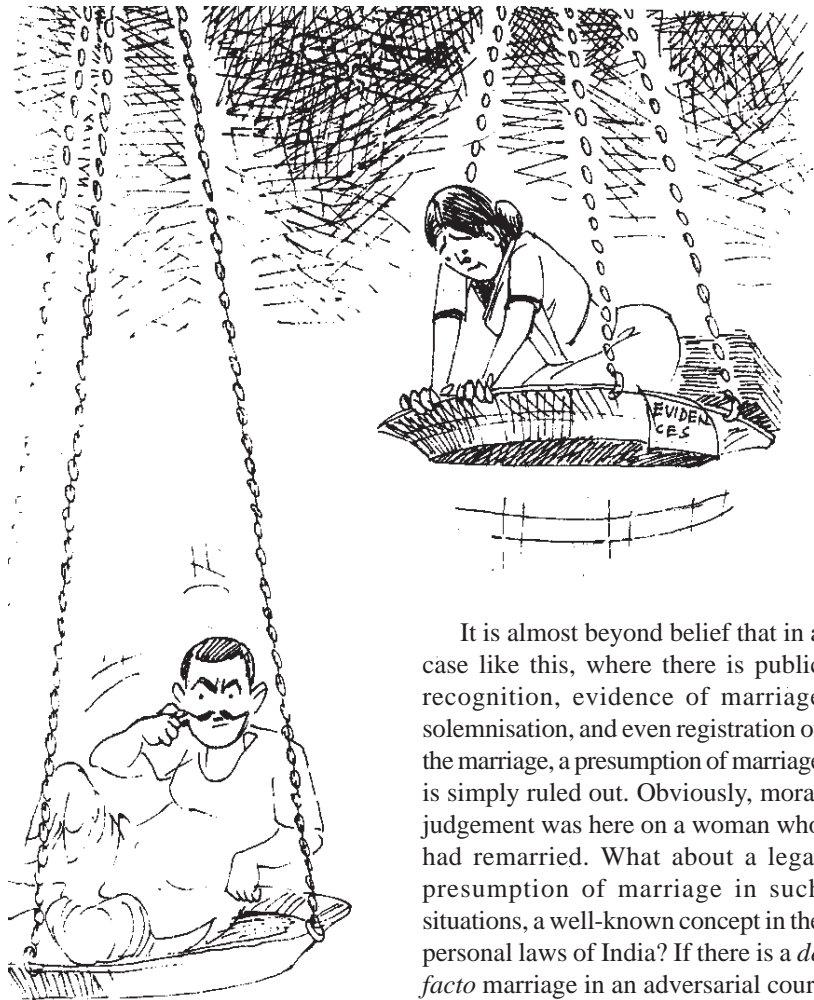


to enter a legally valid Hindu marriage without going through elaborate Sanskritic rituals. However, this is where complex problems of proof arise and where widows and divorcees have to be extremely careful. In Surjit Kaur's case, her opponents succeeded in exploiting the legal insecurities about recognition of informal marriages in which Sanskritic rituals such as *homa* and *saptapadi* have not been performed.

Even before the Hindu Marriage Act came into force in 1955, the law showed signs of confusion. The Deivaini Achi case (AIR 1954 Madras 657) resulted in a large number of Tamil couples being told that they were not legally married since they had only followed simple marriage rituals. However, these marriages were subsequently approved by the law when the Hindu Marriage (Madras Amendment) Act of 1967 came into force. This example confirms that, in South India, there is much more awareness about the scope for customary variations.

The Surjit Kaur case looks even more out of line if we consider that, exactly two weeks earlier, and reported immediately before it in the same issue of AIR, there is a case from Madras which relaxes the burden of proof and holds the exact opposite: never mind the absence of evidence of full rituals, we apply a presumption of marriage because not to do so would be unjust. (See S.P. Balasubramanyam AIR 1994 SC 133). This again confirms the North-South divide in India's legal approaches to women.

The High Court dismissed Surjit Kaur's claim of being married on the basis of lack of evidence and accepted the allegation that she was a loose woman cleverly fishing for property rights. One sentence on page 136 of the case report suggests the Court's perspective: "Surjit Kaur was in the



habit of changing husbands frequently." One suspects that this was part of the strategy to get rid of this problematic woman once and for all by killing her socially and legally. In a desperate plea for justice, Surjit Kaur went in appeal to the Supreme Court, but all she got was another judicial slap in the face. Apparently, Justice Mohan in the Supreme Court did not look through the scheming pleas of the male relatives and simply proceeded to address the legal technicalities of Hindu marriage law. One suspects that the learned judge was so impressed with the statement of the High Court about the doubtful character of the woman, that he saw no need to question its basis.

It is almost beyond belief that in a case like this, where there is public recognition, evidence of marriage solemnisation, and even registration of the marriage, a presumption of marriage is simply ruled out. Obviously, moral judgement was here on a woman who had remarried. What about a legal presumption of marriage in such situations, a well-known concept in the personal laws of India? If there is a *de facto* marriage in an adversarial court setting, judicial attention should also investigate the motives of litigants for questioning such a marriage. Merely accepting wild allegations about a woman's morals cannot be a proper response in a case about property rights.

Depriving women like Kaur of any right in their deceased husband's property means that these women are forced back into the old pattern of looking for another man to support them. If this is what modern Indian law does to its resourceful women, one can imagine the lurking dangers for those whose cases do not even reach the courts. Bad decisions of this kind no doubt contribute to keeping women in subordination. □