before the expiry of the financial year for which the financial sanction existed. Reliance is placed on the judgment of the Delhi High Court in *Rajendra Sareen's case* (2) (supra) and the judgment of their Lordships of the Supreme Court in that very case which have been referrred to above. Their Lordships of the Supreme Court held that the post, which Rajendra Sareen was holding, was being renewed from year to year and since that was an isolated post, his appointment to that post was coterminous with the continuance of the post in the absence of any order to the contrary. The same thing cannot be said in the present case. The post which the appellant was holding was one of the many temporary posts and not an isolated post created only for the appellant. It cannot be said that the creation and sanction of the post and the appointment of the appellant thereto were conterminous and had to exist together. The appellant was appointed against one of the temporary posts that existed in the department and, therefore, his case is clearly distinguishable from *Rajendra Sareen's case* (supra).

(8) For the reasons given above, we find no merit in this appeal which is dismissed, but the parties are left to bear their own costs.

K. S. K.

APPELLATE CIVIL

Before Harbans Singh, C.J. and Bal Raj Tuli, J.

SMT. TULSAN DEVI,—*Appellant.*

versus

SHRIMATI KRISHNI DEVI,—*Respondent.*

L.P.A. No. 182 of 1972.

November 9, 1972.

Hindu Marriage Act (XXV of 1955)—Section 11—Petition under—Whether can be made only during the life time of both the spouses—Civil suit for declaring a marriage nullity—Whether barred.

Held that section 11 of the Hindu Marriage Act,, 1955 does not expressly state that a petition for a declaration of nullity of marriage under that section cannot be made by one spouse after the

death of the other and can be made only when both the spouses are alive. When an application under section 11 of the Act is filed by the spouse after the death of the other, the nature of the case does not permit any averment that there is no collusion between the petitioner and the other party to the marriage, as required under section 20(1) of the Act. A decree for nullity of marriage only declares the status of a person and the death of one of the spouses does not put an end to the right of the other surviving spouse to seek such a declaration. Moreover under section 16 of the Act, the off spring of a void marriage are to be considered as legitimate children notwithstanding the decree of nullity, if it is granted under section 11 or 12 of the Act. A child of such a marriage has been given the right of inheritance to the property of its parents and not of any other relation. When the right of such children to inherit the property of their father is denied, it becomes necessary for their mother to obtain the decree of nullity in order to bestow the character of legitimacy on her children begotten during the subsistence of the void marriage. Hence it is not the requirement of section 11 of the Act that a petition for a declaration of nullity of marriage should be made during the life time of both spouses to the marriage; such a petition can be made by one spouse even after the death of the other.

(Paras 2 & 3)

Held, that there is no provision in the Act barring the jurisdiction of the court under the Act from entertaining a petition under section 11 of the Act by one spouse after the death of the other. Every application under section 11 is cognizable by the court having jurisdiction under the Act and not by any other court. Hence a civil suit for a declaration of nullity of marriage by a spouse is barred and the only proper remedy for such a spouse is to file a petition under section 11 of the Act.

(Para 4)

Letters Patent Appeal under Clause 10 of the Letters Patent against the judgment dated 16th February, 1972, passed by Hon'ble Mr. Justice Man Mohan Singh Gujral, in F.A.O. No. 63-M of 1966.

M. S. Jain, Advocate, *for the appellants.*

N. C. Jain, and V. K. Gupta, Advocates, *for the respondent.*

JUDGMENT

TULI, J—Shrimati Krishni Devi was married to Mangat on December 30, 1956. Some children were born out of the wedlock. Mangat died in 1964. Before getting married with Shrimati Krishni Devi, Mangat had another wife living by the name of Shrimati

Tulsan Devi and had some children from her. After Mangat's death, a dispute with regard to the heirs to his property arose. It was pleaded on behalf of Smt. Tulsan Devi and her children that the marriage of Smt. Krishni Devi with Mangat was a nullity as after the coming into force of the Hindu Marriage Act (hereinafter called the Act), Mangat could not contract a second marriage in the presence of his first wife living and, therefore, her children had no right to succeed to the estate of Mangat after his death. This plea was accepted by the revenue official who sanctioned the mutation of the land left by Mangat in favour of his children from Smt. Tulsan Devi only. Smt. Krishni Devi filed a petition under section 11 of the Act for a decree of nullity of her marriage with Mangat on January 28, 1966. This petition was dismissed *in limine* by the Senior Subordinate Judge, Karnal, on April 18, 1966, on the ground that a petition under section 11 of the Act could be filed only during the lifetime of the two spouses. Smt. Krishni Devi impleaded Smt. Tulsan Devi as the only respondent to her petition under section 11 of the Act. Against that order, Smt. Krishni Devi filed F. A. O. 63-M of 1966, in this Court which was accepted by the learned Single Judge by order dated February 16, 1972. The order of the trial Court has been set aside and the case has been remanded to it for decision on merits. Against that order, the present appeal under clause 10 of the Letters Patent has been filed by Smt. Tulsan Devi.

(2) The learned counsel for the appellant has vehemently argued that a petition under section 11 of the Act can be made only in the lifetime of the two spouses and cannot be made by one spouse after the death of the other. Section 11 of the Act reads as under:—

> 11. 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"

This section does not expressly state that such an application can be made when both the spouses are alive. In order to strengthen his argument, the learned counsel refers to section 20(1) of the Act, which reads as under:—

> "20(1). Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state

that there is no collusion between the petitioner and the other party to the marriage."

The argument, is that it has to be stated in every petition that there is no collusion between the petitioner and the other party to the marriage. The learned counsel forgets that this requirement is subject to the nature of the case, that is, such a statement is to be made only if the nature of the case permits. If the nature of the case does not permit, it is not necessary to make such an averment. When an application under section 11 of the Act is filed by one spouse after the death of the other, the nature of the case does not permit any averment that there is no collusion between the petitioner and the other party to the marriage. By reference to section 20(1) of the Act, it cannot be held that a petition under section 11 of the Act cannot be filed by one spouse after the death of the other. This view is supported by the following observations of a Division Bench of the Madras High Court in *Thulasi Ammal* v. *Gowri Ammal and others* (1) while reversing the judgment of the learned Single Judge :—

"An observation has been made by the learned Judge that a decree of nullity could be obtained only when both the spouses are alive. In this case, the husband Periaswami is dead and the learned Judge seems to have suggested that now one of the spouses to the marriage is no longer alive, it will not be open to the widow to seek for a decree of nullity of her marriage with Periaswami. With respect, we may observe that this question did not arise for consideration before the learned Judge. Since the decree of nullity appears, in our opinion, to be a declaration of the status of a person, we are unable to see why the death of one of the spouses should put an end to the right of the other surviving spouse to seek for such a declaration. No authority in support of either point of view has been placed before us except an observation in Mulla's Commentary, and even that is with regard to voidable marriages. We would, therefore, prefer not to express any opinion upon this question. We would, however, leave to the first plaintiff the second widow of Periaswami to take such steps as may be open to her to have a declaration of nullity of her

(1) A.I.R. 1964 Mad. 118.

marriage, which, if secured, would entitle the second plaintiff, the appellant herein to a declaration of statutory legitimacy. Except for this observation, the appeal is dismissed. There will, however, be no order as to costs."

In that case, the suit had been filed by the second wife as well as her daughter for a declaration of title and for recovery of possession of half of the estate of Periaswami. The wife sought declaration of nullity of her marriage on the ground that when she got married to Periaswami, he had another wife living. The learned District Munsif, who tried the suit, held that the wife had contracted a wholly void marriage by reason of section 5(1) read with section 11 of the Act and in so far as her claim was concerned the suit was rejected. In the case of the daughter, it was held that she was entitled to a share in the property. The order dismissing the suit of the wife that her marriage with Periaswami was null and void was upheld by the Letters Patent Bench. The learned Single Judge in that case had held that decree of nullity of her marriage with Periaswami could not be obtained by the wife after the death of the husband which view was not accepted by the Bench. The judgment of the learned Single Judge is reported as *Gowri Ammal and another* v. *Thulasi Ammal and another* (2).

(3) Section 16 of the Act is very relevant for the decision of this point. It reads as under :—

"16. Where a decree of nullity is granted in respect of any marriage under section 11 or 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 it had been dissolved instead of having been declared null and void or annuled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity :

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annuled by a decree of nullity 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

(2) A.I.R. 1962 Mad. 510.

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

From the language of this section it is clear that the off-spring of a void marriage are to be considered as legitimate children notwithstanding the decree of nullity, if it is granted under section 11 or section 12 of the Act. A child of such a marriage has been given the right of inheritance to the property of its parents and not of any other relation. Since the right of the children of Smt. Krishni Devi to inherit the property of their father was denied by Smt. Tulsan Devi, it was necessary for Smt. Krishni Devi to obtain the decree of nullity in order to bestow the character of legitimacy on her children from Mangat who were begotten during the subsistence of that void marriage. The only persons interested in denying that status to Smt. Krishni Devi and her children are Smt. Tulsan Devi and her children, therefore, a petition under section 11 of the Act was necessary to be filed to safeguard the interests of the children of Smt. Krishni Devi from Mangat. We, therefore, hold that it is not the requirement of section 11 of the Act that a petition for a declaration of nullity of marriage should be made during the lifetime of both spouses to the marriage. Such an application can be made by one spouse even after the death of the other. The first submission made by the learned counsel is, therefore, repelled.

(4) The second submission made on behalf of the appellant is that Smt. Krishni Devi could file a civil suit but not a petition under section 11 of the Act after the death of her husband. We find no merit in this submission either. The observations from the Madras judgment, set out above, clearly show that the suit filed by the second wife of Periaswami for a declaration of nullity of her marriage with him was dismissed and she was left to take such steps as may be open to her to have a declaration of nullity of her marriage. If such a declaration could be granted in the suit, her suit could not have been dismissed and would have been decreed. The dismissal of the suit by the Division Bench of the Madras High Court clearly leads to the conclusion that the learned Judges were of the opinion that the proper remedy for the wife was to file a petition under section 11 of the Act, although they did not expressly say so. No provision of the Act has been brought to our notice barring the jurisdiction of the Court under the Act from entertaining a petition under section 11 of the Act

by one spouse after the death of the other. Every application under section 11 of the Act is cognizable by the Court having jurisdiction under the Act and not any other Court. We are, therefore, of the opinion that a suit in a civil court was barred and the petition under section 11 of the Act filed by Smt. Krishni Devi was competent and it had been wrongly rejected by the learned trial court.

(5) For the reasons given above we find no merit in this appeal which is dismissed with costs.

B. S. G.

LETTERS PATENT APPEAL

Before Prem Chand Pandit and Bhopinder Singh Dhillon, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB, JAMMU AND KASHMIR AND CHANDIGARH AT PATIALA, ETC.,—*Petitioners.*

versus

RAMESH CHANDER, ETC.,—*Respondents.*

Letters Patent Appeal No. 244 of 1972.

November 22, 1972.

Income-Tax Act (XLIII of 1961)—Section 132—Search and seizure warrants under—When can be issued—"Reason to believe", as envisaged in section 132(1)—Adequacy of—High Court—Whether can go into—Scrutiny by the Court—Whether limited—Location of the articles known to the Commissioner—Warrants for search and seizure thereof—Whether can be issued—Articles already seized by another statutory authority—Income-tax authorities—Whether can seize the same—Assessee not given opportunity to take extracts from the seized account books—Whether prejudiced—Final order under section 132(5)—Whether can be quashed on this score—Code of Criminal Procedure (Act V of 1898)—Sections 46 and 54—Police Officer—Whether can detain a person without arrest.

Held, that before the search and seizure warrant can be issued by the Director of Inspection or by the Commissioner under section 132(1) of Income-tax Act, 1961, there must be information in his possession and the information should lead to a belief in case of