

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.861 OF 2014

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|---|---|-------------------|
| 1. Vasant Ramchandra <i>alias</i> Chander |] | |
| Yelvande, Age : 50 years. |] | |
| 2. Pushpa Vasant Yelvande, Age : 45 years. |] | |
| 3. Samadhan Vasant Yelvande, Age : 23 years. |] | |
| 4. Yogesh Vasant Yelvande, Age : 22 years. |] | |
| 5. Tai Vasant Yelvande, Age : 21 years. |] | Applicants / |
| All residing at : Phandkevsati, |] | [Org. Defendant |
| At Post : Nidhoje, Taluka : Khed, Dist. Pune. |] | Nos.1 to 5] |

Versus

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|--|---|--|
| 1. Gurudas Vasantrao Yelvande, Age : 24 years. |] | |
| 2. Bhanudas Vasantrao Yelvande, Age : 20 years. |] | |
| 3. Sindhubai Vasant Yelvande, Age : 45 years. |] | |
| All Agriculturists, all residing at : Kadachiwadi, |] | |
| Post : Chakan, Taluka : Khed, District : Pune. |] | |
| 4. Kamal Sambhaji Marathe, Age : 44 years. |] | |
| 5. Laxmibai Shankar Pawar, Age : 52 years. |] | |
| 6. Tanhaji Sambhaji Marathe, Age : 25 years. |] | |
| 7. Dinkar Maruti Phadke, Age : 40 years. |] | |
| 8. Sopan Raghunath Phadke, Age : 42 years. |] | |
| 9. Govind Laxman Phadke, Age : 55 years. |] | |
| 10. Namdeo Laxman Phadke, Age : 50 years. |] | |
| 11. Balu Laxman Phadke, Age : 45 years. |] | |
| 12. Shivaji Shankar Phadke, Age : 46 years. |] | |
| 13. Baban Shankar Phadke, Age : 48 years. |] | |
| 14. Vilas Shankar Phadke, Age : 50 years. |] | |
| 15. Ramdas Shankar Phadke, Age : 36 years. |] | |
| 16. Kailas Shankar Phadke, Age : 32 years. |] | |

17. Shakuntala Sopan Jadhav, Age : 60 years.]
18. Baidabai Nivrutti Phuge, Age : 55 years.]
19. Sarubai Tahnaji Tapkir, Age : 40 years.]
20. Samudra Sopan Yelvande, Age : 36 years.]
21. Nirmala Netaji Tingre, Age : 44 years.]
22. Rakmabai Shankar Phadke, Age : 70 years.]
23. Shantaram Nivrutti Phadke, Age : 60 years.]
24. Ashabai Patilbua Tapkir, Age : 55 years.]
25. Murlidhar Baban Phadke, Age : 60 years.]
26. Yeshvant Baban Phadke, Age : 50 years.]
27. Vimal Baban Phadke, Age : 55 years.]
- Respondent Nos.4 and 6 residing at : Maruti]
Landge Chawl, Kaasarwadi, Pune-38.]
- Respondent No.5 residing at : Parvati Paytha,]
Near Janta Datt Mandir, Uma Shankar]
Meetwale Vasahat, Pune - 9.]
- Respondent Nos.7 to 16, 22, 23 and 25 to 27]
residing at : Phadke Vasti, Village - Nigoje,]
Taluka - Khed, District - Pune.]
- Respondent No.17 residing at :]
At Post - Nanekarwadi, Post - Chakan,]
Taluka Khed, District Pune.]
- Respondent No.18 residing at :]
Beside Mankikar Hospital, Pune-Nashik]
National Highway-20, Bhosari, Pune.]
- Respondent No.19 residing at : Tapkir Vasti,]
Charholi Khurd, Tal. Haveli, Dist. Pune.]
- Respondent No.20 residing at Jamdar Khore,]
Nigoje, Tal. Khed, Dist. Pune.]
- Respondent No.21 residing at : Dhanori, Near]
Bus Stop, Tal. Haveli, Dist. Pune.]

Respondent No.24 residing at Patilbua Vasti,]
Charholi Khurd, Tal. Haveli, Dist. Pune.] Respondents

Mr. Shailendra S. Kanetkar for the Applicants.

Mr. B.K. Barve, a/w. Mr. Sandip Barve and Ms. Shital Tanpure, i/by
M/s. B.K. Barve & Co., for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 16TH APRIL, 2018.

ORAL JUDGMENT :

1. Heard Mr. Kanetkar, learned counsel for the Applicants, and Mr. Barve, learned counsel for the Respondents.

2. By this Revision Application, filed under Section 115 of the Civil Procedure Code, 1908, the Applicants are challenging the order dated 2nd May 2014 passed by the Joint Civil Judge, Junior Division, Khed, below the application at “Exhibit-43” filed in Regular Civil Suit No.134 of 2004.

3. The application at “Exhibit-43” was filed by the present Applicants, who are Defendant Nos.1 to 5 before the Trial Court, under Order 7 Rule 11(d) of CPC, for rejection of the plaint on the ground that the Suit is barred by law.

4. In order to appreciate the submissions advanced at bar by learned

counsel for both the parties, it would be essential to recite few facts of the case.

. Respondent Nos.1 to 3 herein had filed the Suit before the Trial Court for partition and separate possession of their share in the suit property on the ground that, these properties are the ancestral joint family properties of the present Applicant No.1, who is the father of Respondent Nos.1 and 2 and husband of Respondent No.3. In paragraph No.1 of the plaint, the Respondents have described the suit properties, which consist of the agricultural lands and the house properties. In paragraph No.2 thereof, it is categorically stated that, the suit properties are the ancestral joint family properties of the Applicants and the Respondents herein. It was further stated that, the suit properties were originally owned by the father of the present Applicant No.1, namely, Ramchandra @ Chander, who has died, while in the joint family, on 25th June 1985. After his death, his wife Shevantabai has also died, when the family was joint, on 14th July 2003. During his life-time, Ramchandra was looking after the management of the ancestral joint family properties, being the 'Karta' thereof. Thereafter, Applicant No.1-Vasant was looking after the same. Ramchandra has, apart from Applicant No.1 as his son, Original Defendant Nos.6 and 7 as his daughters. Applicant No.1-Vasant has married with Applicant No.2-Pushpa and also with Respondent No.3-Sindhubai. Out of his wedlock with Applicant No.2-

Pushpa, he has two sons and one daughter by name Samadhan, Yogesh and Tae; whereas, out of his marriage with Respondent No.3-Sindhubai, he has two sons by name Gurudas and Bhanudas. According to the Respondents, all of them are still in the joint family and enjoying the ancestral properties of the joint family in common.

5. In paragraph No.3 of the plaint, the Respondents-Plaintiffs had given the genealogy, which is described as above. Paragraph No.4 of the plaint is very relevant. It is stated therein that, Applicant No.1-Vasant had initially married with Applicant No.2-Pushpa; however, as Pushpa did not conceive any child, Applicant No.1-Vasant separated from his wife Pushpa. Then Pushpa went to reside in the house of her parents. Thereafter, Applicant No.1-Vasant performed marriage with Respondent No.3-Sindhubai and started residing with her. Out of the said wedlock, he had Respondent Nos.1 and 2 as his children. Thereafter, Vasant brought back Pushpa and started residing with Pushpa and had Applicant Nos.2 to 4 as his children from Pushpa.

6. In paragraph No.5 of the plaint, it is stated that, thereafter, Vasant started creating third party interest in the suit properties. He has also got a bogus 'Sale-Deed' and 'Gift-Deed', dated 4th January 2001 and 23rd January 2001, respectively, executed of some portion of the suit properties, which are false, *void ab initio* and, therefore, not binding on

their shares. Thus, the Suit was filed by the Respondents-Plaintiffs for the relief of partition of their one half share in the suit properties and also for a declaration that the 'Sale-Deed' dated 4th January 2001 and the 'Gift-Deed' dated 23rd January 2001 are not binding on their shares.

7. The Applicants, who are Defendant Nos.1 to 5 before the Trial Court, have, on their appearance, filed the application before the Trial Court, under Order 7 Rule 11(d) CPC for rejection of the plaint, contending *inter alia* that, as the Respondent-Plaintiff Nos.1 and 2 are the children born out of the second marriage of Applicant No.1-Vasant, that marriage being illegal, null and void, Respondent Nos.1 and 2 cannot receive any share in the ancestral joint family properties of Vasant and, therefore, they had no *locus-standi* to file such Suit for partition and declaration, at-least during the lifetime of their father-Vasant. The Suit, as filed, is, therefore, not maintainable and preliminary issue to that effect be framed.

8. The Trial Court has, accordingly, vide its order dated 3rd March 2010, framed the preliminary issue as to “*whether the Suit is maintainable, as framed?*”

9. In the light of the submissions advanced before it by learned counsel for both the parties, the Trial Court was pleased to hold in

paragraph No.11 of its impugned order that, at this stage, the nature of the suit properties is yet not decided and that can be decided only at the time of final hearing of the Suit. It being, therefore, a mixed question of law and fact, it would not be correct at this preliminary stage itself to hold that the Suit is not maintainable. Accordingly, the Trial Court has rejected the said application.

10. In the light of these facts on record, which are stated in the plaint itself and which are to be considered as *sine qua non* for deciding the application under Order 7 Rule 11(d) of CPC, it has to be held that, in my considered opinion, the averments made in the plaint are more than eloquent and sufficient to show that Defendant No.1, i.e. Applicant No.1-Vasant, has performed two marriages. His first marriage was, admittedly, with Applicant No.2-Pushpa; whereas, his second marriage, during the lifetime of Pushpa and during subsistence of his marriage with Pushpa, was with Respondent No.3-Sindhubai. Thus, on the plain reading of the averments made in the plaint, as stated in paragraph No.4 thereof, Respondent No.3-Sindhubai is the second wife; whereas, Applicant No.2-Pushpa is the first wife of Vasant. The children born from Sindhubai are, thus, born from the wedlock, which is *void ab initio*, the said marriage being performed during the lifetime of first wife-Pushpa and during the subsistence of the first marriage of Pushpa.

11. In such situation, the question raised for consideration is, *'whether Respondent Nos.2 and 3, who are the children born from Respondent No.3, namely, the second wife-Sindhubai, can get any share in the ancestral joint family properties of Applicant No.1-Vasant, when, as per the own showing of the Respondents-Plaintiffs also, all the suit properties are the ancestral joint family properties of Vasant and as on today also, partition has not been effected between Vasant and his sisters?'*

12. According to learned counsel for the Respondents, Respondent Nos.2 and 3 are, though the children of a void marriage, they are entitled to share in the properties of their father, as Section 16 of the Hindu Marriage Act, 1955, as amended in 1976, specifically provides that, *"children of a marriage, which is void, are not to be regarded as illegitimate, but are to be regarded as legitimate"* and they are further conferred right in the property of their parents, in view of Section 16(3) of the Hindu Marriage Act, 1955.

13. Per contra, according to learned counsel for the Applicants, Respondent Nos.2 and 3 being the children born out of second marriage, they can be entitled to share only in the individual property of their father, but they cannot get any share in the ancestral joint family properties of their father. Secondly, assuming that they are having

share in the ancestral joint family properties of their father, their right will arise only by way of succession and not during the lifetime of their father. Therefore, at this stage, when their father, i.e. Applicant No.1- Vasant, is alive, their Suit for partition cannot be maintainable. Hence, the plaint is liable to be rejected, being barred by law.

14. In my considered opinion, in order to understand and appreciate the legal matrix involved in this case, it would be useful to refer to Section 16 of the Hindu Marriage Act, 1955, which is reproduced for ready reference as follows :-

“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 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 (68 of 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."*

[Emphasis Supplied]

15. Thus, as per the legal position, as it stands today, the legitimacy is definitely conferred on the children born out of a void marriage, which has been declared to be so in proceedings under the Hindu Marriage Act and also to the children of such a marriage, whether it has been so declared or not in a proceeding under the Act.

16. The real question for consideration, however, is, *'what effect it has so far as right of such children to get share in the property of their parents ?' ; 'Whether the property of 'their parents' include, only their self-acquired property or also the joint family property?'* ; and as in this case, *whether such children claim their share in the property during the lifetime of their father?*

17. These provisions of Section 16 of the Hindu Marriage Act, 1955, have been subject matter of interpretation in various decisions of this Court, other High Courts and also of the Hon'ble Supreme Court. Learned counsel for the Applicants has also, in this respect, placed reliance on the Judgment of the Division Bench of this Court in the case of *Shantaram Tukaram Patil and Anr. Vs. Smt. Dagubai Tukaram Patil and Ors.*, 1987 (1) Bom.C.R. 714. Therein, after taking the review of all its earlier decisions, the Division Bench of this Court, in paragraph No.18, was pleased to hold that,

18. *"In our opinion, therefore, it will be incorrect to say that, the son of a void marriage, though legitimate by virtue of the provisions contained in Section 16 of the Hindu Marriage Act, can claim a share in the property, which belongs to a coparcenary, of which his father is a Member."*

18. Then, in paragraph No.24 of the said Judgment, it was further held that,

"24. Since no child acquires a right in the property of its parents by birth, these rights can be exercised only by way of succession to the property. For that purpose, such children are to be treated as heirs in Class-I of the Schedule to the Hindu Succession Act and they are entitled to succeed in accordance with the provisions contained in Section 8 of the Hindu Succession Act."

19. In paragraph No.27 of the Judgment, the Division Bench has

summarized propositions of law emerging from its discussion as follows :-

“I. In regard to a child of a void marriage :

- (1) A child of a marriage, which is void under the provisions of Hindu Marriage Act, whether a decree of nullity is passed or not, is a legitimate child [Section 16(1) of Hindu Marriage Act];*
- (2) Such a child does not acquire right to property, which a legitimate child would, but the legitimacy confers upon him right to property of his parents. [Section 16(3) of Hindu Marriage Act];*
- (3) The property, to which such a child can lay claim, must be the separate property of the parents and not the coparcenary property, in which the parent has a share. (Contrary view in (Raghunath V. Nana), LXXXVII Bom.L.R. 488, is not the correct law);*
- (4) Since no child, whether legitimate or otherwise, acquires right by birth in the separate property of its parent, a child of a void marriage can only succeed to the property of its parent in accordance with the provisions of Section 8 or Section 15 of the Hindu Succession Act;*
- (5) A child of a void marriage is related to its parent within the meaning of Section 3(1)(j) of the Hindu Succession Act, because of the provisions of Section 16 of the Hindu Marriage Act; proviso to Section 3(1)(j) must be confined to those children, who are not clothed with legitimacy, under Section 16 of the Hindu Marriage Act.”*

20. Thus, in this Judgment, it is authoritatively laid down that the children of a void marriage, though are regarded as legitimate, such children would not be entitled to any share in the properties, which are the ancestral co-parcenary joint family properties of their father. Their right to claim share remains limited only to the extent of the separate property of their father, but, in that property, they cannot make any claim to it during the lifetime of their father. Their rights in the separate properties of their father will accrue only on the death of the father and that too, by way of succession.

21. Though the Andhra Pradesh High Court in the case of *Rasala Surya Prakasarao and Ors. Vs. Rasala Venkateswararao and Ors.*, AIR 1992 ANDHRA PRADESH 234, has taken the view that, the illegitimate sons are even entitled to equal shares with natural sons and can be treated as coparceners; it has also confirmed the view that they cannot claim partition during their father's lifetime. In paragraph No.33 of the said Judgment, it was held as follows :-

“33. From the principles enunciated in the various decisions discussed above, it is quite clear that even prior to the advent of S. 16 of the Hindu Marriage Act, both, as per the Shastric and Textual Law as well as the decisions of the highest Courts, the illegitimate son of a Sudra is entitled to enforce a partition after the father's death. He is entitled to the rights of survivorship as he becomes a

coparcener with the legitimate son. The decisions have held that, he is a member of the family and that he has status as a son and by virtue of that, he is entitled to the right of survivorship. Section 16 of the Hindu Marriage Act has conferred on him the status of a legitimate son and his other pre-existing rights are, in no way, curtailed. After the 1976 Amendment of Section 16, the benefits of Section 16 are enlarged and such benefits are also conferred on a son of a marriage, which is void under the provisions of the Hindu Marriage Act, whether a decree of nullity is passed or not, such a son becomes a legitimate son. Such a child is also entitled to rights of succession under the Hindu Succession Act. A child of void marriage is related to its parents within the meaning of S. 3(1)(j) of the Hindu Succession Act by virtue of S. 16 of the Hindu Marriage Act. Proviso to Section 3(1)(j) must be confined to those children, who are not clothed with legitimacy under S. 16 of the Hindu Marriage Act. In conclusion, we hold that, by virtue of S. 16(1) of the Hindu Marriage Act, as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father, whether the property be originally joint family property or not. The only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father.”

[Emphasis Supplied]

22. In the case of *Jinia Keotin and Ors. Vs. Kumar Sitaram Manjhi and Ors.*, (2003) 1 SCC 730, the Hon'ble Supreme Court had an occasion to deal with these provisions. Therein, after considering the amendment to

Section 16(3), as amended by Act 68 of 1976, the Hon'ble Supreme Court was pleased to consider the object, scope and sweep of Section 16(3) of the Act, as follows :-

4. *"We have carefully considered the submissions of the learned counsel on either side. The Hindu Marriage Act underwent important changes by virtue of the Marriage Laws (Amendment) Act, 1976, which came into force with effect from 27th May 1976. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children, which depended very much upon the marriage between their parents being valid or void, thus, turned on the act of the parents, over which the innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable, chose also to confine its application, so.*

far as succession or inheritance by such children is concerned, to the properties of the parents only.”

[Emphasis Supplied]

5. *“So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time, it expressly provides in sub-section (3) by engrafting a provision with a non obstante clause, stipulating specifically that 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”. In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act, but also would amount to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.”*

23. Thus, the Hon'ble Supreme Court has found that the express mandate laid down by Legislature in Section 16(3) of the Act cannot be

ignored, by resorting to any presumptive or inferential process of reasoning to confer any further rights on such children in the joint family property. Thus, the views of the Andhra Pradesh High Court, favouring wide interpretation, were found contrary to its Scheme by the Hon'ble Supreme Court.

24. Relying on this Judgment of the Apex Court in the case of *Jinia Keotin and Ors. Vs. Kumar Sitaram Manjhi and Ors. (Supra)*, learned Single Judge of this Court, [*Coram: B.P. Dharmadhikari, J.*], in the case of *Gayabai wd/o. Sakharam Jambhulkar and Ors. Vs. Gopal Sakharam Jambhulkar and Anr., 2008 (4) Mh.L.J. 286*, was pleased to hold that, Section 16(3) confers upon a child of a void marriage, rights only in or to the property of his parents. The concluding part of this sub-section also makes it clear that, no new rights are being made available and, therefore, if something is denied to such child, because it is not legitimate child of his parents, such rights are not being conferred by Section 16 upon him. It was held that, in view of this limited sweep of sub-section (3) of Section 16, though legitimacy has been given to illegitimate children, it is only for the purposes of succeeding to the properties of parents and nothing more.

25. In view of this decision of the Apex Court in the case of *Jinia Keotin & Ors. Vs. Kumar Sitaram Manjhi and Ors. (Supra)*, the

Karnataka High Court, in the case of *Kenchegowda Vs. K.B. Krishnappa and Ors.*, 2009 (1) Civil LJ 141, was again pleased to hold, in the light of the facts similar to this case, wherein the Suit was filed for partition by the illegitimate son against his father, that,

“By Section 16, what the Parliament intended to do was to remove the stigma of bastardliness attached to a child born of such void marriage and the child has been relegated the status of a legitimate child. Therefore, after the Amendment Act, 1976, which introduced Section 16 into the Act, the illegitimate son has been given equal status as that of a legitimate son. That is precisely what is sought to be done under Section 16(1) and (2) of the Act. However, the Parliament was conscious of the consequences of such status being given to an illegitimate child, as it would affect other persons, who are in no way responsible for the birth of an illegitimate child. Therefore, they made it clear by introducing Section 16(3) to the effect that such an illegitimate son, who is admitted to be a legitimate son, by virtue of Section 16(1) and (2), will have a right only in the properties of the parents and none else. Thus, the conferring of the status did not affect the rights of the persons other than the parents in the property.” [Emphasis Supplied]

26. Thereafter, taking review of its earlier decisions, it was held in paragraph No.23 as under :-

“Therefore, it follows that, Section 16 of the Act contains a legal fiction. It is by a rule of 'fiction juris' that the legislature has provided that, children, though illegitimate, shall nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable. However, it is a legal fiction with limitation.

The reason behind such limitation is that the Parliament had no intention of eclipsing the settled concepts of Hindu Law such as coparcenary, coparcener, coparcenary property, joint family and joint family property, right of coparcener to acquire by birth and interest in the coparcenary or joint family property, under Mitakshara Law. Therefore, the object sought to be achieved by this provision is two fold. Firstly, the restoration of status. For the act of the parents over which the innocent child had no control and for no fault of it, had to suffer a permanent set back in life and being called a bastard, an illegitimate child. This social evil was wiped out. For all practical purposes, the child was treated as a legitimate child born out of a lawful wedlock. Secondly, the cause for such a status of affair was their parents. Therefore, in the properties of the parents equal rights are given to such children, as that of the children born of lawful wedlock. After achieving this twin object, the Parliament took care to see that conferment of status and right to property on the illegitimate child did not invade the rights of others, who are also innocent and who are in no way responsible for this sorry state of affairs. Thus, the illegitimate child covered by sub-section (1) or (2) of Section 16 of the Act, even on conferment of legitimacy, was not allowed by law to claim equal status under Hindu Law as that of a legitimate child. Though by the aforesaid provision, the illegitimate child has been conferred the status of a legitimate child, it did not confer the status of a coparcener. Consequently, such a child did not acquire any right by birth in any property, much less, coparcenary or joint family property. In the light of the express words used in the provision, which clearly sets out the legislative intent, in particular sub-section (3) of Section 16, any attempt on the part of the Courts to expand the scope of the said provisions and confer rights on such child in coparcenary or joint family property amounts to re-legislating on the subject,

under the guise of interpretation, against the will of the Parliament clearly expressed in the enactment itself. It is impermissible. ” [Emphasis Supplied]

27. Thereafter analyzing the Scheme of Sections 6 and 8 of the Hindu Succession Act, in paragraph Nos.29 and 30, the law is summed up as follows :-

29. *“If a legitimate son cannot file a suit claiming share in respect of his father's property, by virtue of Section 8 of the Succession Act, the illegitimate son, who has now been conferred the status of a legitimate son also has no right to claim a share in the father's property by filing a suit. In other words, during the lifetime of a father, a son, legitimate or illegitimate, has no right to seek a share in father's property. Their right arises only after such person dying intestate.”* [Emphasis Supplied]

30. *“The principle underlying the concept is that the property to be divided is Ex. vi termini, the property, which has been previously held as Joint Property in co-parcenary. The son's right at birth, under the Mitakshara Law, is so connected with the right to share in and to obtain partition of the estate, that it does not exist independently of the latter right. Thus, under the Hindu law, the son acquires right to co-parcenary property by birth. In other words, he acquires title to the co-parcenary property by birth. It is a vested right. It is that right in the property i.e. the right to joint enjoyment of the property, which is transformed into an enjoyment in severally through the process of partition. It is that antecedent title, which the members of a co-parcenary*

passes by birth jointly with other members of the co-parcenary, which is specifically defined at the partition. Existence of an antecedent title is a prerequisite for enforcement of a right to partition. Separate or self-acquired property of a member of the co-parcenary or joint family cannot be the subject matter of partition amongst the member of a co-parcenary or joint family. No child, whether legitimate or illegitimate, acquires any right by birth in the separate property or the self-acquired property of its parents. Thus, they acquire no title to such property by birth. They do not possess any antecedent title to such property. The right to such property accrues to them only on their parents dying intestate. It is the death of the parents and not the birth of the child, which confer right on such property. In respect of such property, both, legitimate and illegitimate child, succeed in accordance with the provisions of Sections 8 and 15 of the Succession Act, if the parents die intestate. It is only after the event i.e. death, the suit for partition could be filed. Therefore, it follows that no suit for partition could be filed against the parents during their lifetime, in respect of separate self-acquired property of parents. The illegitimate son is not a coparcener. He has no right in coparcenary property. However, he has a right in the share of the father in coparcenary property. That right he can exercise only on his father dying intestate. He has no right by birth in the separate or self-acquired property of his parents. His right accrues only after his parents die intestate. Therefore, a son born of void or voidable marriage (illegitimate son) can never maintain a suit in respect of the property of his parent, against his or her parent.

[Emphasis Supplied]

28. Ultimately it was held that, the Plaintiff, who is a illegitimate son, though has a right in the share of his father in coparcenary or joint family property, to get the said right, he has to wait for the death of his father. He cannot maintain a suit against his father, claiming right in those properties. Accordingly, it was held, in paragraph No.32, that;

32. "The lower Appellate Court was justified in holding that, the suit filed by Plaintiff against his father is not maintainable and also the suit filed by the Plaintiff seeking partition in respect of the co-parcenary property is also not maintainable."

29. The latest, though not the last, pronouncement of the Hon'ble Apex Court on this subject is of *Revanasiddappa and Anr. Vs. Mallikarjun and Ors., (2011) 11 SCC 1*, wherein the Apex Court has again considered the interpretation of Section 16(3) of the Hindu Marriage Act and after taking the review of its earlier decisions and also of the above referred decisions of the various High Courts, held that the view taken in *Jinia Keotin (Supra)* was a narrow view of Section 16(3), which was followed in *Neelamma Vs. Sarojamma, (2006) 9 SCC 612*, holding that, illegitimate children would only be entitled to a share in the self-acquired property of the parents and not to the joint Hindu family property. It was held by the Hon'ble Supreme Court in this decision that, *"we cannot accept the said interpretation"*. In this decision, the Hon'ble

Apex Court was pleased to take note of the changing social norms and constitutional values. In the words of the Hon'ble Supreme Court,

30. With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society, law cannot afford to remain static. If one looks at the history of development of Hindu Law, it will be clear that it was never static and has changed from time to time to meet the challenges of the changing social pattern in different times.”

30. Thereafter, the Apex Court also considered the Constitutional provisions of Article 300-A and Article 39-F, which deal with the 'Concept of Property Rights' and held that,

28. “The legislature has used the word “property” in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired. Section 16 contains an express mandate that such children are only entitled to the property of their parents and not of any other relation.”

29. “On a careful reading of Section 16(3) of the Act, we are of the view that the amended section postulates that such children would not be entitled to any rights in the

property of any person, who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment. However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be on a par with other legitimate children and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents. [Emphasis Supplied]

31. Thus, after considering and being inclined to give beneficial interpretation to Section 16(3) of the Act and also the right to property, which is enshrined in Article 300-A of the Constitution, then Article 39(f) of the Directive Principles of State Policy, the Apex Court was pleased to hold that, Section 16(3), as amended, does not impose any restriction on the property right of such children, except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral.

32. Ultimately, the Hon'ble Supreme Court has concluded as follows :-

46. *“For the reasons discussed above, we are constrained to take a view different from the one taken by this Court in*

Jinia Keotin, Neelamnma and Bharatha Matha on Section 16(3) of the Act.”

47. *“We are, therefore, of the opinion that the matter should be reconsidered by a larger Bench and for that purpose the records of the case be placed before the Hon'ble the Chief Justice of India for constitution of a larger Bench.”*

33. Even if this Reference before the Larger Bench is yet to be decided, the fact remains that, as on today also, for the children born to the second wife, who are rightfully called as 'legitimate', their right to get share, whether in the co-parcenary Joint family properties or in the property of their parents, arises only after the death of their parents and not during the lifetime of their parents. Their right accrues by succession and not by birth. Hence, during the lifetime of their parents, they cannot claim share in it. Their Suit for partition of such property, therefore, cannot be maintainable during the lifetime of their parents.

34. As in the present Suit, during the lifetime of Petitioner/Defendant No.1-the father himself, the Respondents-Plaintiff Nos.2 and 3 are claiming their one half share in the properties, which are, admittedly, the ancestral joint family properties of Defendant No.1-Vasant, the Suit is apparently barred by law, therefore, not maintainable.

35. Though learned counsel for the Respondents-Plaintiffs has placed reliance on the Judgment of Division Bench of this Court in the case of

Union of India and Anr. Vs. V.R. Tripathi, 2016 (5) ALL MR 28, however, in my considered opinion, that Judgment cannot be applicable, as it is arising from totally different facts and circumstances and it is not at all concerned, in any way, to the issue involved in the present case. The issue in the said Judgment was about the compassionate appointment, which was claimed by the son born to a second wife. When the challenge was raised thereto on the ground of 'illegitimacy', it was held that,

“Even though marriage with second wife may be void, nevertheless, children of such marriage are legitimate and hence, the said challenge is not tenable.”

36. The question raised in the present Suit is not whether the Respondents-Plaintiffs are legitimate children or illegitimate children. The question, *'whether they are having the right in the suit properties'*, also need not detain this Court at this stage. As the question is, *'whether during the lifetime of their parents, namely, the father, can they claim partition in the ancestral joint family properties of their father'?* and the answer to the said question, as stated above and as held by the Apex Court also, is in 'negative'.

37. Once it is held that the Suit of the present nature is not maintainable, the next question for consideration is, *'whether the plaint can be rejected under Section 7 Rule 11 of CPC?* In other words, *“In view of the legal position discussed above, can it be called as barred by*

any law?'; and 'whether the word "law" includes the law laid down by the Apex Court or only the statutory law?'.

38. In this respect, learned counsel for the Applicants has rightly relied upon the Judgment of the Hon'ble Apex Court in the case of *Bharvagi Constructions and Anr. Vs. Kothakapu Muthyam Reddy & Ors.*, 2017 SCC OnLine SC 1053, wherein the Hon'ble Apex Court has approved the view taken by the learned Single Judge of this Court, [B.P. Colabawalla, J.], in the case of *Shahid S. Sarkar and Ors. (Applicants), in the matter between Usha Ramrao Bhojane Vs. Mangala Shivdas Dandekar and Ors. (Defendants)*, 2017 SCC OnLine Bom 3440, and that of the Allahabad and Gujarat High Court and held in paragraph No.32 that, the Law occurring in Clause (d) of Rule 11 of Order 7 CPC, includes not only legislative enactments but also judicial precedents. An authoritative judgment of the courts including higher judiciary is also law. It, therefore, cannot be said that the term "barred by any law" occurring in Clause (d) of Rule 11 of Order 7 of CPC ought to be read to mean only the law codified in legislative enactment and not the judicial precedents.

39. Thus, in this case, once it is held that the right of the children born out of the second marriage, even in respect of the property of their parents, far remain the joint family property of their father, accepting that they are having right in the ancestral joint family properties also,

such right will accrue only on the death of their father and in the present case, as Applicant No.1-Vasant is very much alive, during his lifetime, Respondent Nos.2 and 3 cannot have any right to seek partition. Therefore, there is no cause of action, in the real sense, accrued to them for filing the present Suit. Hence, this is a Suit, which is not only barred by law, but also on the count that the meaningful reading of the plaint does not disclose the real cause of action, as that cause of action will accrue only on the death of Applicant No.1-Vasant and not during his lifetime. Therefore, this is a case where the plaint needs to be rejected under Order 7 Rule 11(a) and (d) of CPC.

40. The submission of learned counsel for the Respondents-Plaintiffs is that, they are not only seeking the relief of partition, but they are also seeking the relief of declaration relating to the 'Sale-Deed' and 'Gift-Deed' executed by Applicant No.1-Vasant, to be not binding on their share and as regards this relief, it is submitted that, the Suit is required to be held as maintainable. According to learned counsel for the Respondents, if during the lifetime of Applicant No.1-Vasant, he continues to dispose of the property by making such alienations, then the Respondents-Plaintiffs will have no property even to seek partition thereof. Therefore, according to learned counsel for the Respondents, as regards the relief of declaration, it cannot be said that this relief is barred by any law or there is no cause of action to file the Suit for such declaration.

41. However, as rightly submitted by learned counsel for the Applicants, even to claim this relief of declaration in respect of the 'Sale-Deed' and the 'Gift-Deed', as a consequential and ancillary relief, Respondents will have to show that they are having the right in the properties of their father-Vasant during his lifetime. As stated above, their right in the properties of their father-Vasant will arise only when the succession opens on the death of Vasant and not during his lifetime. In such situation, for this relief also, it cannot be said that, as on today, they are having any right to sue.

42. Hence, as held above, their Suit is, at present, barred by law, which is laid down in Section 16(3) of the Hindu Marriage Act and which is also interpreted, as stated above, by the various Judgments of the High Courts, including this Court and the Supreme Court. If their right to suit property arises, when the succession opens on the death of their father, then, during the lifetime of their father, they cannot claim any relief of either the declaration or the partition in respect of their father's share in the ancestral joint family properties.

43. Therefore, when, apparently, the Suit is barred by law and in such situation, the Trial Court has committed an error in holding that, there is a mixed question of fact and law about the nature of the suit properties. When on the own showing of the Respondents-Plaintiffs, as

stated in the plaint, all the suit properties are the ancestral joint family properties inherited by Defendant No.1-Vasant from his father Ramchandra, then, there cannot be any mixed question of fact and law about the nature of the properties. If, as per the plaint also, the properties are the ancestral joint family properties, then, during the lifetime of Applicant No.1-Vasant, the Respondents cannot get any share therein and, therefore, there is no cause of action for filing the Suit. The Suit, as filed, is expressly barred by law, as declared by the Hon'ble Supreme Court. On this ground itself, the Trial Court should have rejected the plaint. As the Trial Court has not done so, the impugned order passed by the Trial Court is required to be quashed and set aside.

44. The Revision Application is, accordingly, allowed. The impugned order passed by the Trial Court is quashed and set aside. As a result, the plaint stands rejected, under Order 7 Rule 11(a) and (d) of CPC.

45. At this stage, learned counsel for the Respondents-Plaintiffs seeks stay to the operation of this order, in order to enable the Respondents to approach the Hon'ble Supreme Court. The request made being reasonable, the operation of this Judgment and Order is stayed for a period of twelve weeks from today, on account of Summer Vacation.

46. In consequence, the ad-interim relief granted by this Court, staying

further proceedings and hearing of the Suit pending before the Trial Court, which was granted vide order dated 28th November 2014 and continued from time to time till today, is continued for a further period of twelve weeks from today.

[DR. SHALINI PHANSALKAR-JOSHI, J.]