

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 353/2017

- 1) Vitthal Shriram Aghav,
Aged about 48 years, Occu:
- 2) Subhadrabai Shriram Aghav,
Aged about 68 years, Occu:
- 3) Ramesh Shriram Aghav,
Aged about 38 years, Occu:
- 4) Nandkishor Vitthal Aghav,
Aged about 17 years, Occu:
- 5) Yogesh Vitthal Aghav,
Aged about 13 years, Occu:

Nos.4 & 5 minor, through their
guardian Kusum Vitthal Aghav,

Nos.1 to 5 R/o Chincholi-Sangale,
Tq. Lonar, Distt. Buldhana.

- 6) Jijabai Kundlik Sonune,
Aged about 38 years, occu:
Rajiv Gandhi Nagar, Aurangabad,
Tq. & Distt. Aurangabad.
- 7) Ratnamala D/o Vitthal Aghav,
Aged about 11 years, Occu:
- 8) Rekha D/o Vitthal Aghav,
Aged about 10 years, Occu:

Nos.7 & 8 minors through guardian
Vitthal Shriram Aghav.

Nos.7 & 8 R/o Chincholi-Sangale,
Tq. Lonar, Distt. Buldana.

- 9) Indubai W/o Shriram Aghav,
Aged about 28 years, Occu:

R/o Chincholi-Sangale, Tq. Lonar,
Distt. Buldana.

10) Dnyaneshwar Sonaji Jadhav,
Aged about 43 years, Occu:

11) Mahadu Mannu Shingane,
Aged about 43 years, Occu:

12) Kaduji Bhikaji Jadhav,
Aged about 38 years, Occu:

Nos.10 to 12 R/o Chincholi-Sangale,
Tq. Lonar, Distt. Buldana.

....APPELLANTS

...VERSUS...

Deleted as per
Court order
dated
06/06/2022

1) Rakhamabai Shriram Aghav,
Aged 63 years, Occu: Agriculturist,

2) Ushabai Pandharinath Nagare,
Aged about 41 years,
Occu: Household,

Both R/o B & C Quarters, Shanivar
Bazar, Near Rest House, Parbhani,
Tq. & Distt. District Parbhani.

...RESPONDENTS

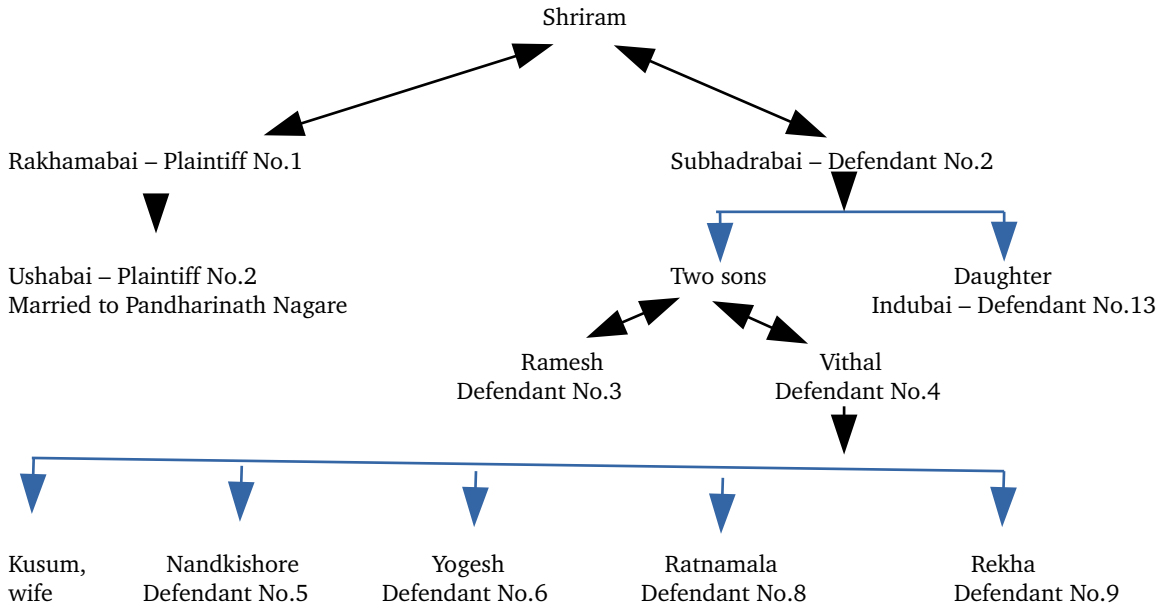
Mr. R.L. Khapre, Senior Advocate for Appellants.
Mr. V.K. Paliwal, Advocate for the Respondents.

CORAM :- **S.M. MODAK, J.**
RESERVED ON :- **02/09/2021 & 06/06/2022**
PRONOUNCED ON :- 10/06/2022

JUDGMENT

Heard Shri R.L. Khapre, learned Senior Counsel for the appellants
and Shri V.K. Paliwal, Learned Counsel for the respondents.

2. Deceased Shriram Chandrabhan Aghav married to Rakhamabai Shriram Aghav – Plaintiff No.1 and Subhadrabai Shriram Aghav – Defendant No.2. He was having issues out of these marriages. They are as follows : -



3. Rakhamabai Shriram Aghav – Plaintiff filed a Suit for partition bearing R.C.S. No.20 of 2008 in the Court of Civil Judge Junior Division, Lonar, Buldhana. Rakhamabai claimed that her marriage with Shriram took place 40/50 years prior to filing of Suit (in the year 2002). Earlier this Suit was filed in Court at Mehekar later on it was transferred to Lonar Court. There were four agricultural lands and open land along with one house situated at village -Chincholi Sangle Taluka-Lonar, Dist.Buldhana. It is described in para. No. 1 of the plaint. They were the suit properties. Ushabai – Plaintiff No.2 is a daughter born to Rakhamabai out of the said wedlock. Shriram ill-treated her and drove her out of the house. Initially, she filed maintenance proceeding. She succeeded in that and then filed partition Suit claiming share for herself and her married daughter.

4. Deceased Shriram has not given evidence. He expired on 10th October, 2005. Subhadrabai – Defendant No.2 filed joint written statement.

According to her, she is the first wife of Shriram and Rakhamabai – Plaintiff No.1 is the second wife. Defendant No.13 pleaded a will dated 26/4/2005 executed by her father Shriram in her favour and land bearing Gat No.7, Survey No.57/5-A, 1.19 R area is bequeathed to her. Plaintiffs have challenged the will. So also plaintiffs have challenged the partition effected by Shriram in between his two sons in the year 1975. Shriram has also executed a sale deed in respect of part of suit land. So also defendant no.4 has sold away part of suit land in favour of defendant no. 8 and 9 and plaintiffs have also challenged these transactions.

5. So the issue before the trial Court was “whether Plaintiff No.1 was the 1st Wife or Defendant No.2 was the first wife of Shriram”. The learned trial Court answered the issue in favour of Plaintiff No.1. As such Defendant No.2 being second wife was held not entitled to any share, but her children being illegitimate children, were held entitled not an independent share in coparcenary property, but they were held entitled to share in the share of their father Shriram- Defendant No.1. The Suit properties were held as ancestral properties. The shares allotted by the trial Court were as follows :-

PROPERTIES		
Shriram – Defendant No.1	Rakhamabai – Plaintiff No.1	Ushabai – Plaintiff No.2
1/3	1/3	1/3

1/3 share of Shriram				
Plaintiff No.1 1/15	Plaintiff No.2 1/15	Defendant No.3 1/15	Defendant No.4 1/15	Defendant No.15 1/15

6. So total share allotted to the plaintiffs was :

Plaintiff No.1	Plaintiff No.2
$1/3 + 1/15 = 6/15$	$1/3 + 1/15 = 6/15$

7. There were 13 Defendants. Out of them, Defendant No.3, 4 and 13 are the children of Defendant Nos.2 and 3. Whereas Defendant Nos.5, 6, 8 and 9 are the children of Defendant No.4. Whereas Defendant Nos.7, 10, 11 and 12 are the purchasers of some of the Suit properties. All the Defendants except Defendant Nos.7, 10, 11 and 12 have preferred First Appeal. However, they could not succeed and the Appeal was dismissed and Judgment of the trial Court was confirmed. Now the same Appellants have preferred the present Second Appeal. This Appeal was admitted on 05/12/2017, on the following substantial questions of law :

“(i) Whether the findings recorded in the Suit for maintenance filed by the Plaintiffs being Special Civil Suit No.22 of 1983 would operate as resjudicata against the present Appellants who were not party to those proceedings.

“(ii) What shall be the shares of the sons and daughters of Subhadrabai begotten from Shriram after reference pending before the Larger Bench of the Hon’ble Apex Court in Revanasidappa & anr. Vs. Mallikarjun & Ors.: reported in AIR 2011 SC (Supp) 155?”

8. Special Civil Suit No.22 of 1983 was filed by present two Plaintiffs for maintenance against Shriram – Defendant No.1 and Subhadrabai – Defendant No.2 in the Court of Civil Judge Senior Division, Buldhana. Shriram was directed to pay Rs.100 p.m. Suit of Plaintiff No.2 Ushabai was dismissed as she was married. Shriram preferred R.C.A. No.95 of 1988 in the Buldhana District Court. It was dismissed. Copies of the Judgments of trial Court and the First Appellate Court were placed before the Court

which decided the partition Suit (at Exh. 79 & Exh.80 respectively). This Court has perused them with the assistance of both the parties. In that suit Shriram – Defendant No.1 initially admitted Rakhamabai – Plaintiff No.1 as his legally wedded wife (para 4). But by way of amendment in the written statement, he has denied Plaintiff No.1 as his first wife. He has described Subhadrabai -Defendant No.2 as his first wife and described marriage with Plaintiff No.1 performed after enactment of the Hindu Marriage Act and hence illegal.

9. In that maintenance Suit, Subhadrabai has not filed written statement but she gave evidence whereas Shriram though filed written statement has not given evidence (para 10). The learned trial Court gave categorical findings that Plaintiff No.1 is legally wedded wife of Defendant No.1 (para 14 above). This finding was confirmed by the first Appellate Court (Exh. 170/A) at para 17.

Scope of Second Appeal

10. In case of *Bharatha Matha & Anr. Vs. R. Vijaya Renganathan & Ors.* reported in ***AIR 2010 SC 2685***, was observed that “interference in second appeal is permissible only if finding recorded by lower Courts is perverse”. There was a suit for partition filed by brother of wife of husband. Husband has denied the marriage. Question was whether the marriage between deceased wife and the defendant husband can be presumed on the basis of long standing cohabitation. Both the Courts below have held that the marriage cannot be presumed as the husband was already married. In second appeal High Court has interfered in that concurrent findings. Hon’ble Supreme Court has reversed the said decision. High Court has considered the evidence of defendant only. Such approach is deprecated. Considering the above ratio the questions need to be decided.

Grievances in this Appeal

11. It is contended that except present Defendant Nos.1 and 2, none were the parties in that Suit. So present Defendant Nos.3, 6, 8, 9 and 13 were not parties in the maintenance Suit and as such findings in that Suit “about legality of marriage of Plaintiff No.1 with Defendant No.1 is not binding on them”. Learned senior counsel Shri Khapare relied upon the following Judgments:-

Sr. No.	Judgment Cited
1	<i>Jerbanoo Rustomji Garda v. Pootlamai Mnecksha Mehta, AIR 1955 BOMBAY 447</i>
2	<i>Survepalli Siddaiah v. Survepalli Penchalamma, AIR 1963 AP 158</i>
3	<i>Suhas Manohar Pande v. Manohar Shamrao Pande, AIR 1971 BOMBAY 183</i>
4	<i>Kumari Byathaiah and others v. Kumari Pentaiah and others, 2001 AIR SCW 4668</i>
5	<i>Smt. Chand Dhawan v. Jawaharlal Dhawan, 1993, AIR SCW 2548</i>

12. This issue can be looked from two angles. One is which can be called as matrimonial Court for purpose of Section 41 of the Evidence Act and second whether principle laid down under Section 11 of the Civil Procedure Code is applicable.

Matrimonial Court

13. I have read those Judgments very minutely. The Judgments involve matrimonial dispute, will dispute etc. The Courts have dealt with the effect of findings in earlier proceedings on the issues pending in subsequent proceedings. The provisions of Section 41 of the Evidence Act, Section 11 of Civil Procedure Code, general principles of *res judicata* were discussed. Earlier to enactment of Hindu Marriage Act, 1955, there were no special matrimonial Courts for Hindus. At that time, such disputes were tried by

Civil Court under Section 9 of Civil Procedure Code. For Christians, there was Indian Divorce Act and it gives jurisdiction to District Court. But this was not the position for Hindus prior to 1955. Whereas Section 41 of the Evidence Act, 1872 was in force prior to 1955.

14. However, after enactment of the Hindu Marriage Act, the District Court is given special jurisdiction to deal with matters arising out of the Hindu Marriage Act. Simultaneously, the Hindu Adoption of Maintenance Act was enacted in the year 1955. However, the said Act does not give jurisdiction to particular Court. Ultimately, the jurisdiction depends upon pecuniary claim of maintenance.

15. Section 41 of the Evidence Act uses terminology 'matrimonial Court'. Can the Court dealing with maintenance Suit can be treated as a Court exercising matrimonial jurisdiction? We are not supposed to deal with this issue in a broader perspective but only with a view "which can be considered as matrimonial Court" for the purpose of Section 41 of the Evidence Act.

16. From five Judgments referred above, one is on the point of probate jurisdiction. (***Jerbanoo Garda***) and one is on the point of purchase-sale transaction under civil law (not under Section 41 of the Evidence Act (***Kumari Byathaiah***)). Whereas in case of ***Smt Chand Dhawan***, the issue was "*whether the matrimonial Court can deal with prayer for permanent alimony under Section 25 of the Hindu Marriage Act when the marital status is not being affected?*" That is to say when there is no divorce decree, "*whether permanent alimony can be granted?*" It was answered in the negative. In such an eventuality, the claim for maintenance has to be decided under the Hindu Adoption and Maintenance Act.

17. Whereas in case of ***Survepalli Siddaiah***, the District Munsiff Court granted maintenance to wife as she was abandoned. On this background, husband filed Petition under Section 10 of the Hindu Marriage Act for judicial separation. There was an objection taken by wife that issue has been decided and hence it amounted to *res judicata*. It was upheld and the Petition was dismissed. High court reversed the said decision and observed :-

“7. It should be borne in mind that the judgment in the maintenance suit decided the rights as between the parties and that being a proceeding inter parties, in our opinion, it cannot be pleaded as a bar to a petition under Sec.10 of the Hindu Marriage Act. A judgment by a Subordinate Judge or a District Judge in exercise of the Jurisdiction conferred upon them by the Hindu Marriage Act would surely fall within the purview of Sec. 41 of the Indian Evidence Act. Any decision given in the exercise of matrimonial jurisdiction would be conclusive not only against the parties to the proceeding but against the whole world. In other words, such judgments would operate as judgments in rem. The suit decided by the District Munsif would not bind anyone except the parties thereto and it is only a Court exercising matrimonial jurisdiction that could make judgments in rem. A valid dissolution of marriage causes the relationship between the husband and wife to cease to exist as against the whole world. That result could not be achieved by a decision rendered by a Civil Court in a suit for maintenance.”

However, High court has not expressed any opinion on the point of applicability of principles of *res judicata*, which reads thus:

“6. As substantiating this distinction, he relies on the judgment of the Supreme Court in Bhagwan Dayal v. Reoti Devi, AIR 1962 SC 287 (SC). It is not necessary for us to express any opinion on this controversy, as we think that the matter is governed by another principle.”

18. Whereas in case of ***Suhas Manohar Pande***, Taramati filed a Suit for restitution of conjugal rights before the District Court in the year 1957. It was decreed when her husband filed an Appeal, wife Taramati died and the Appeal was abated. Plaintiff being son of Taramati filed a suit for maintenance against his father. Father denied the relationship with mother

and son. *Res judicata* was considered as preliminary issue and it was held that Suit was maintainable. However, Suit was dismissed on merits as it held that marriage was not proved. In an appeal, division Bench of this Court held:-

“12... We are, therefore, of the opinion that the judgment in Civil Suit No.32-A of 1957 which decides the question regarding the status of Taramati as wife of Manohar is binding and conclusive for all times and in the instant suit also that judgment could have been taken as a conclusive piece of evidence to hold that Taramati was the legally married wife of Manohar, Manohar was a party to that suit and he is a party to this suit also. Besides, Suhas who claims to be the legitimate son of Manohar is the son of Taramati and as such, he could be said to be representative in interest of Taramati, though strictly that is also not necessary since the judgment binds the whole world.”

19. This court accordingly held that Taramati was legally wedded wife. This findings was given on the basis of findings given by matrimonial Court about lawful marriage. However, this Court has not expressed any opinion on the evidence adduced in matrimonial Suit. The provisions of Section 41 of Evidence Act is interpreted as follows:

“9... It will thus be seen that a judgment, order or decree of a competent Court in the exercise of matrimonial jurisdiction is of a conclusive nature and confers upon a person a right in rem which is not only binding on the parties to the suit, but binding as against the whole world....”

About the position prior to and after 1955, it was observed

“9... Prior to the enactment of the Hindu Marriage Act, 1955 so far as the Hindus were concerned, there was no matrimonial jurisdiction to decide the questions regarding the matters connected with marriage, such as restitution of conjugal rights, judicial separation, divorce, nullity of marriage, declaration of a marriage as void etc. By enacting the Hindu Marriage Act, 1955, Act No.25 of 1955, a special jurisdiction has now been conferred with respect to the Hindu inhabitants in relation to marital matters and now

the District Court is constituted a Special Court for determining the questions arising under the Hindu Marriage Act. All these questions now arising under the Hindu Marriage Act would be questions within the matrimonial jurisdiction and are no longer triable by the ordinary Civil Court as was done previously under Section 9 of the Code of Civil Procedure....”

20. If we consider the provisions of Section 41 of the Evidence Act on the background of above interpretation we find that the judgment to be relevant must be given by the matrimonial Court. This word is not defined anywhere. Its ordinary meaning is "relating to marriage". Even in the Hindu Marriage Act, the word 'marriage' is not defined. Section 5 only lays down conditions of the Hindu Marriage. Hindu Succession Act, Hindu Adoption and Maintenance Act and the Hindu Minority and Guardianship Act are other three Acts forming part of Hindu Code Bill. In those three Acts, any Court is not prescribed which is having jurisdiction to deal with the issues arising under those three Acts. It is only under the Hindu Marriage Act, the District Court is given jurisdiction to deal with the issues arising out of the that Act. Hence, the issues arising under those three Acts are to be decided by the regular Civil Court.

21. There are various issues which arise under those three Acts. The issue of succession, of adoption, of maintenance of minority and guardianship arises. While deciding those issues also issue of marriage need to be decided sometime. At the same time, it is also important to note that Courts dealing with issues arising under those three Acts is not supposed to give any relief as to marriage. It is only the Court under the Hindu Marriage Act which can give relief relating to marriage.

22. In the judgment of *Survepalli Siddaiah*, and of *Suhas Pande*, it was held that judgment delivered by the matrimonial Court under the Hindu Marriage Act which is relevant under Section 41 of the Evidence Act. This

ratio is applicable to the facts before us. The civil Court which decided RCS No. 20 of 2008 has decided maintenance relief. While deciding that issue, that Court held that the marriage of Plaintiff No.1 with Defendant No.1 was the first marriage. Admittedly, that Court cannot be considered as the matrimonial Court under the Hindu Marriage Act.

Findings of Trial Court

23. Trial Court framed issue No.1 as follows:-

"Whether the plaintiffs prove that Plaintiff No.1, is legally wedded wife of Defendant No.1?"

The material reasoning for that issue is as follows:

"16. It has been held in above judgment that plaintiff No.1 is legally wedded wife of defendant No.1. In the said judgment, it has clearly been mentioned that defendant No.1 had admitted in his written statement that plaintiff No.1 is his legally wedded wife. Moreover it is to be noted that judgment and decree passed in Spl. Civil Suit No.22/1983 was challenged before the Hon'ble District Court, Buldana vide Regular Civil Appeal No.95/1988. In the said appeal, judgment and decree passed in Spl. Civil Suit No.22/1983 has been confirmed. In view of the judgments of Spl. Civil Suit No.22/1983 and Reg. Civil Appeal No.95/88, it is crystal clear that plaintiff No.1 is legally wedded wife of defendant No.1. It is not disputed that plaintiff No.2 is a daughter of plaintiff No.1 and defendant No.1 and thereby she is a legitimate child of defendant No.1.

17. In view of the discussion supra, I am of the considered opinion that the plaintiff No.1 is the legally wedded wife of the defendant No.1. Hence, I record affirmative finding on issue No.1."

Findings of Appellate Court

24. Whereas First Appellate Court has framed point No.2 as follows:-

"Whether it is proved that plaintiff No.1 is legally wedded wife of defendant No.1?"

First Appellate Court observed thus :

“24. Plaintiff no.1 was held to be legally wedded wife of defendant no.1 in Special Civil Suit No.22/1983. It is mentioned in para 4 of the judgment and order passed therein that present defendant no.1 admitted the plaintiff no.1 to be his legally wedded wife. Findings recorded in said suit were confirmed in Regular Civil Appeal No.95/1988. Quantum of maintenance of Rs.100/- awarded to plaintiff no.1 was enhanced upto Rs.1,000/- in Reg. C. S. No.19/2003. All these judgments and decrees have attained finality. These proceedings were between plaintiff no.1 and defendant no.1. These judgments are relevant under section 41 of the Indian Evidence Act, 1872. As per said section, these judgments are a conclusive proof of the fact that legal character of being legally wedded wife of defendant no.1 accrued to plaintiff no.1 when these judgments were delivered.”

25. When above observations are read, we find that there is no discussion about legal provisions except at one place, the First Appellate Court referred to Section 41 of the Evidence Act. But there is no discussion as to how the previous judgment can be said to be relevant under Section 41 of the Evidence Act. There is no discussion as to how it is considered as judgment given by the matrimonial Court. I think both the Courts have failed to consider the ingredients of Section 41 of the Evidence Act. Both the Courts below simply considered the parties in the matrimonial Suit are parties in partition Suit. Both the Courts have not considered that the main issue in the maintenance Suit was of maintenance and issue of marriage was not the main issue. It was an ancillary issue.

Principle of Res judicata u/s. 11 of C.P.C

26. After the above discussion, it need to be seen whether the judgment given in maintenance suit amounts to res-judicata in a partition suit. Section 11 of the Civil Procedure Code is relevant. The following are the main ingredients.

- a) Earlier suit is decided and subsequent suit is filed.

- b) Subsequent suit must be between the parties to the first suit or claiming through either of the parties.
- c) The earlier suit must have been decided on merits.
- d) There are direct and substantial issue involved in subsequent suit. And those issues were also directly and substantially involved in the earlier suit.

27. If above conditions are fulfilled, then only Court seized of subsequent suit cannot try that suit or the issue. Out of the issues arising in a suit, some of the issues are minor issues whereas some of the issues are the major issues. For example when there is a suit for possession of immovable property and there is no declaration as to ownership of that property and when defendant denies the ownership of the plaintiff over the property, Court is supposed to inquire into the ownership of the plaintiff over the suit property. However, the nature of inquiry is limited in order to decide only the possession of the plaintiff over the suit property. This is a secondary issue involved in the suit considering the nature of pleadings. However when the plaintiff has asked for declaration as to ownership over the suit property, the issue of the ownership property is the principal issue. For Section 11 of the Code of Civil Procedure in order to attract the findings given in the earlier suit as res-judicata for a subsequent suit, the issue must be directly and substantially involved in the earlier suit. If it is not so it does not amount to res-judicata in a subsequent suit.

28. When we apply these principles to the facts involved before us, we may find that in the maintenance suit, the principal issue was whether the defendants therein are liable to pay maintenance to the plaintiff. The plaintiff has alleged defendant no.1 as her husband and her marriage was first in time. On these pleadings, there was denial and it is pleaded that it is not the plaintiff but defendant no.2 is the first wife. In nutshell, the marriage with plaintiff was denied. In order to succeed in that maintenance

suit, the plaintiff must prove that her marriage is first in time. At the same time, it is important to note that there is no relief claimed as to marriage, for example declaration of plaintiff's marriage legal and valid. On this background, the issue as to marriage was decided by the Court seized of the maintenance matter. However it cannot be said that the issue of marriage was an issue directly and substantially involved in that suit. That issue was necessary to be decided only for deciding the relief as to maintenance. This is so because there is no relief as to marriage. Whether an issue is directly and substantially in issue has direct connection to the reliefs claimed. The trial Court and the First Appellate Court have not discussed anything about the application of Section 11 of the Civil Procedure Code they have simply referred Section 41 of the Indian Evidence Act.

29. There is difference in between the provisions of the Section 41 of the Indian Evidence Act and Section 11 of the Civil Procedure Code. A judgment is relevant under Section 41 of the Indian Evidence Act only in certain categories of litigation. That is to say matrimonial, insolvency, probate, admiralty jurisdiction whereas for Section 11 of the Civil Procedure Code, it is applicable to all sorts of civil litigation. However, both the Courts below have not touched the aspect of Section 11 of the Civil Procedure Code. The parties the maintenance suit have given evidence in that suit and the suit was decided on the basis of that evidence. It is but natural for the parties to believe that the findings in the earlier suit are relevant. But Court does not decide the matter on the basis of presumption and assumption of the parties but on the basis of settled principles of law.

For the above discussion, there is every reason to interfere in the findings of both the Courts below. Hence it is held that judgment given by the maintenance Court is neither relevant under section 41 of Evidence Act nor binding of the present parties under section 11 of C.P.C. relevant for

deciding the partition suit. Accordingly substantial question of law no. 1 is answered in the negative.

SUBSTANTIAL QUESTION OF LAW NO.2 ABOUT THE SHARES

30. On this background, this question needs to be decided on the basis of the evidence adduced by the parties before the trial Court. Shares can only be decided only when their status of the parties is answered. Because ultimately shares will depend on whose marriage is legal and consequentially who are legitimate and who are illegitimate children.

Evidence adduced by the parties

31. It is required to be seen whether the evidence on record suggest defendant No.1 Shriram married with plaintiff No.1 Rakhamabai first. It is important to note that during her evidence, Rakhamabai has never said about the year of her marriage with Shriram. That is to say whether it was prior to the Hindu Marriage Act, 1955 or afterwards. The issue of valid marriage can be looked into from two angles. One is the law relating to marriage and second is the evidence adduced on that point.

32. If the marriage of Rakhamabai with Shriram was performed prior to 1955, it will be governed as per the uncodified law that is to say as per the customs prevailing amongst the parties. If it is after 1955, it will be governed as per the provisions of Hindu Marriage Act. Section 5 of the Hindu Marriage Act lays down the conditions for Hindu marriage. The parties must be belonging to Hindu religion, they must not be having a spouse living at the time of marriage, parties must be capable of giving valid consent, they must be of marriageable age, not within the degrees of prohibited relationship and they are not sapindas of each other are the conditions for Hindu Marriage. The relevant condition for our discussion is the parties must not be having a spouse living at the time of marriage. In a

proceedings before us, defendant No.2 Subhadrabai deposed that she was the first wife and as such marriage with Rakhamabai is not valid. Whereas Section 7 of the Hindu Marriage Act lays down how the marriage has to be performed. It has to be performed as per customary rites and ceremonies and by taking of seven steps if custom allows.

Evidence in the suit

33. Neither plaintiff No.1 nor defendant No.2 has said anything as to performance of any of the ceremonies to their marriage. Admittedly, there is no documentary evidence to support the marriage of Rakhamabai and also of Subhadrabai. Even either of them have not said about the month and date of their respective marriages. Plaintiff No.1 Rakhamabai has deposed in her evidence “that her marriage was performed 45 to 50 years back”. If we take those years from the year 2004 (when the evidence was given), it comes to 1954. Whereas defendant No.2 Subhadrabai has not at all deposed as to when her marriage was performed. About the marriage of Rakhamabai, “she said that it was performed four years after she gave birth to son Vitthal and daughter Indubai.

34. Except examining herself, Rakhamabai has not examined any witness on the point as to when did she marry to Shriram. Witness Pandharinath Madhav Nagre is her son-in-law (husband of plaintiff No.2 Ushabai). Defendant No.1 Shriram expired on 10/10/2005. He has not given evidence. Apart from examining herself, defendant No.2 Subhadrabai examined her son Vitthal and daughter Indubai. They cannot be the witness to the marriage in between their mother and father. The witness Amruta Chate and Govinda Gunaji Sangle are also not the persons who were present when defendant No.1 and defendant No.2 married with each other. So also Vitthal Sonaji Jadhav has also not witnessed the marriage in between defendant No.1 and defendant No.2.

35. Learned Senior Advocate Shri Khapre relied upon judgment in case of Thakur Gokal Chand Vs. Parvin Kumari Alias Usha Rani reported in AIR 1952 SC 231. It is on the point of presuming a particular fact by the Court. The Court may presume existing of a particular fact which it thinks likely to have happened. If a man and woman are cohabiting together continuously, a presumption as to marriage can be drawn. But it is rebuttable presumption. While discussing the evidence, the Hon'ble Supreme Court also considered the effect of Section 50 of the Evidence Act. The issue is about relationship, opinion expressed by the persons who are having special means of a knowledge is relevant fact.

36. In this case, we have got the opinion evidence of Pandharinath (from the side of plaintiffs) and opinion evidence of Amruta Chate and Govinda Sangle (from the side of defendants).

37. In addition to above oral evidence, following documents were tendered:

- a) Exhibit 137- birth extract of defendant Chandrabhan on 10/03/1956
- b) Exhibit 138- birth extract of defendant no.1 Shriram on 05/03/1934
- c) Exhibit 139- birth extract of a daughter born to Shriram dated 15/03/1959
- d) Exhibit 140- birth extract of a daughter born to Shriram on 02/09/1959.

38. So we have got the oral evidence of two ladies that is plaintiff No.1 and defendant No.2 and witnesses (who have not attended any of the marriage) on one hand and documentary evidence in the form of birth certificate on the other hand. The birth certificate of defendant No.3 Chandrabhan @ Ramesh @ Karbhari is dated 10/03/1956 whereas two birth certificates of daughters are dated 15/03/1959 and 02/09/1959. In

all certificates, names of sons and daughters are not there and naturally so. According to the defendant Vitthal, Indubai was born on 15/03/1958 and Ushabai was born on 10/05/1959. However, Exhibit 139 and 140 does not bear the date as deposed by Vitthal. It will be material to see the observations of the trial Court and the First Appellant Court.

39. The trial Court has not cared to refer to these documents whereas the First Appellate Court in paragraph No.21 has referred to these documents and in paragraph No.22 has opined “these documents do not give rise to any inference that defendant No.2 is the first wife and plaintiff No.1 is second wife of defendant No.1.” This approach of the First Appellate Court is erroneous and documentary evidence is not properly appreciated by the First Appellate Court. In paragraph No.22, the First Appellate Court has also referred two lacunas about the marriage of defendant No.1 with plaintiff No.1 on one hand and defendant No.2 on the other hand. If such is a scenario, the First Appellate Court ought to have appreciated the documents properly.

40. On this background, we can certainly infer that defendant Chandrabhan was born on 10/03/1956 to defendant No.2 out of marriage with defendant No.1. On the other hand, plaintiff No.1 has not produced any documents about when did plaintiff No.2 was born to her. According to the defendant No.2, plaintiff No.2 was born four years after the birth of defendant Ramesh and Indubai. Plaintiff No.1 could have very well produced certain documents about the birth of plaintiff No.2 even plaintiff No.2 has not entered into witness box. About social recognition of plaintiff No.1 as a wife of defendant No.1 on one hand and social recognition of defendant No.2 as wife of defendant No.1, we have got the oral evidence of witnesses, so there is a word against word. Their evidence is a sort of opinion evidence. It is diluted by the documentary evidence in the form of above mentioned birth certificates. The trial Court and the First Appellate

Court have not appreciated the documentary evidence in a proper manner. It considered from this angle, it is difficult to believe that plaintiff No.1 has proved that she married with defendant No.1 45/50 years back and she is the first wife of defendant No.1. We do not agree to the conclusion drawn by the trial Court and confirmed by the First Appellate Court on this aspect. For the above discussion, it is held that plaintiff No.1 has not proved to be the first wife of defendant No.1. Whereas there is reason to believe that defendant No.2 married to defendant no.1 first.

41. For the above discussion, question arises, what will be the effect on the claim of the partition and shares of the parties. If plaintiff No.1 cannot be said to be the first wife of defendant No.1, she is not entitled to get share in the property of deceased defendant No.1. Both the Courts below have recognized the right of the woman to claim partition when parties themselves have partitioned the property. In that view of the matter, both the Courts below were right. There are revenue records referred by the trial Court and the First Appellate Court, they are as follows:

- a) 7/12 extract- (Exh.-61-64)
- b) Hakkache Patrak- (Exh.-68-77)
- c) Assessment list (Exh.-78)
- d) Hakkache patrak- (Exh. 81-82)

Both the Courts below have treated the suit properties as ancestral properties of the deceased. From the oral evidence and the documentary evidence it cannot be said that the suit properties are the ancestral properties of the deceased Shriram. A property is an ancestral property if it is herited from forefathers or it is acquired from the income of the joint family or it is thrown in common hotchpot by any of the member of the family. There is no evidence to suggest that the suit properties are acquired in any of the above manner.

It is also true that during his lifetime deceased Shriram has sold away some lands and also bequeathed certain property to defendant Indubai. She

could not prove the will. It is also true that being exclusive owner deceased Shriram has every right to deal with the properties as he wants. However, the evidence on the point of will is unsatisfactory so the theory put up by the defendant Indubai cannot be relied upon. For the above discussion we cannot interfere with the property sold by the deceased Shriram during his lifetime. So his heirs will be entitled to the property which remained at the time of his death. Both the Courts below have allocated the following shares:-

PROPERTIES		
Shriram – Defendant No.1	Rakhamabai – Plaintiff No.1	Ushabai – Plaintiff No.2
1/3	1/3	1/3

1/3 share of Shriram				
Plaintiff No.1 1/15	Plaintiff No.2 1/15	Defendant No.3 1/15	Defendant No.4 1/15	Defendant No.5 1/15

So total share allotted to the plaintiffs was :

Plaintiff No.1	Plaintiff No.2
$1/3 + 1/15 = 6/15$	$1/3 + 1/15 = 6/15$

However, in view of the findings that plaintiff No.1 could not prove her status as the First lawful wife of defendant No.1 she could not get any share in the property. Unfortunately she died prior to disposal of this appeal. So the claim of plaintiff no.2 only remains. So the shares need to be modified. There is also an argument about extent of share held by illegitimate children in the ancestral property.

42. Learned Senior Counsel Shri Khapre, relied upon the following judgments-

- a) Jenia Keotin and others Vs. Kumar Sitaram Manjhi and others reported in **(2003) 1 Supreme Court Cases 730**
- b) Revanasiddappa and Anr V. Mallikarjun and Ors reported in **2011 (3) AIR Kar R 230**
- c) Ashok Sadarangani and Anr. Vs. Union of India and Ors. reported in **AIR 2012 Supreme Court 1563**

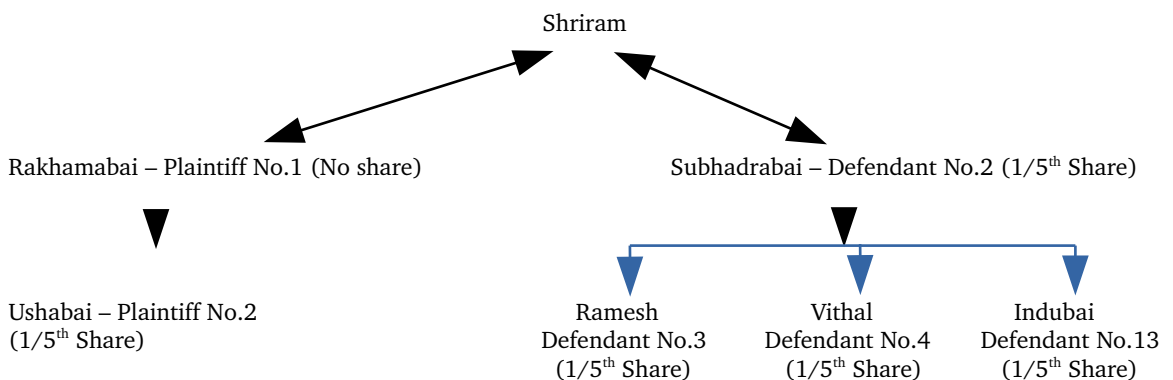
According to him, illegitimate children cannot succeed any share in the joint Hindu family. As per Section 16(1) of the Hindu Marriage Act, a children born out of null and void marriage is considered as a legitimate children, however, sub-section 3 is an exception to the principle laid down under Section 16(1) of the said Act. It has been held in case of Jenia Keotin and others Vs. Kumar Sitaram Manjhi and others reported in **(2003) 1 Supreme Court Cases 730**, it is also true that in case of Revanasiddappa and Anr V. Mallikarjun and Ors reported in **2011 (3) AIR Kar R 230**, the Hon'ble Supreme Court has directed that this issue be kept before the Larger Bench for its reconsideration, yet the Larger Bench has not expressed any view.

43. If the Larger Bench has not decided the issue what will be the effect on pending cases has been answered by the Hon'ble Supreme Court in case of Ashok Sadarangani and Anr. Vs. Union of India and Ors. reported in **AIR 2012 Supreme Court 1563**. According to the observations therein, the views which were prevailing when the matter is directed to be placed before the Larger Bench still holds the field. Learned Advocate Shri Paliwal relied upon a judgment in case of Balkrushna Pandurange Halde Vs. Yashodabai Balkrushan Halde reported in **2018 (6) BCR 388**. This Court

has also taken a note of reference pending before the Hon'ble Supreme Court paragraph No.36. Similar view was expressed to the effect that the children born from second wife are entitled to get a share only in the property of their parents and not in joint family properties.

44. In view of the above, it is held that plaintiff No.2 Ushabai is a daughter born to defendant No.1 from plaintiff No.1. Being illegitimate daughter she cannot claim any share in the ancestral property. It is pertinent to note that it is not proved that suit property is the ancestral property. In that situation, plaintiff No.2 is entitled to a claim share just like legitimate children of defendant No.1 born from defendant No.2. As it is not proved that the suit properties were ancestral properties, deceased Shriram is having exclusive right to deal with the suit property and as such partition effected by him amongst himself and two sons Nos.3 and 4 cannot be re-opened. At the same time, sale of the land by him and subsequent sales cannot be faulted. This Court cannot interfere with the purchasers made by Defendant Nos.7, 10 and 11. So also defendant No.13 cannot get exclusive title over part of the suit land because she has failed to prove the will. The lands coming to the share of Nos.3 and 4 and sales made will have to be treated as part of the suit land coming to their share.

45. In view of the above, there shares will be as follows:



So the above will be allocation of shares. During this allocation, defendant no.3 and 4 and defendant no.13 Indubai be given preference in giving the land coming to their share as per the partition and alleged will respectively.

46. In view of the above discussion, the substantial question of law No.2 is answered accordingly. Hence, I pass following order:

ORDER

- a) The appeal is partly allowed
- b) Judgment and decree passed by the Court of Civil Judge, Junior Division, Lonar on 10/02/2014 in RCS No.20/2008 is modified as follows:

It is declared that Plaintiff No.2- Ushabai, Defendant No.2- Subhadrabai, Defendant No.3- Ramesh, Defendant No.4- Vitthal and Defendant No.13- Indubai are entitled to get 1/5th share in the suit property.
- c) The direction “the sale transactions of Survey No.59 are not binding of share of plaintiffs” is set aside.
- d) The direction no.5. “The will deed dated 26/04/2005 executed by defendant No.1 in favour of defendant No.13 is not binding on the share of plaintiffs.” is confirmed.
- e) When the preliminary decree will be put to execution, the executing Court to ascertain the lands which had come to the share of defendant no.3 and 4 and defendant No.13 and preferably to consider those lands as coming to their shares.
- f) If the lands as mentioned in direction No.(e) to the share of defendant No.3,4, and 13 is more than their individual share,

they are directed to reimburse the plaintiff no.2 by paying her the amount for the share which she may get less by valuing the land at today's market price.

- g) The Executing Court to consider the principle laid down in Order 26 Rule 14 of the Code of Civil Procedure.
- h) There is no modification in rest of the order.

47. In view of the above, Second Appeal is disposed of. Parties to bear their own costs.

Pending Civil Applications are disposed of.

JUDGE

At this stage learned Advocate Shri Paliwal for respondents submitted that the appellants are likely to sell the property. So they may be injuncted. It is opposed by learned Senior Advocate Shri Khapre for the appellants, for the reason that such prayer can be made before the concerned Court.

It is matter of record that deceased Shriram has sold away the property during his lifetime and he has also partitioned the property amongst two sons and they have also sold the property. So it will be a question, whether there is any property available for the share of the plaintiff No.2. It can be decided by the concerned Court. So I am inclined to injunct all these appellants from selling or creating third party interest in respect of the land standing on their names on 7/12 extract which is the

part of the suit land. This direction is granted for a duration of three months from today. Respondent No.2 can ask for further relief before the concerned Court.

JUDGE

R.S. Sahare