

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.271 OF 2011

1.Lankabai Krishna Bibe

Age: 38 years, Occ: Household

2. Sou. Kankabai Vasam Gawade,

Age: 33 years, Occ: Household

3. Sou. Pankabai Lalasaheb Gatakal

Age: 31 years, Occ Household

All residing at Saval, Tal: Baramati,

Dist. Pune

...Appellants

Versus

1. Shri Macchindra Krushna Atole,

Age; 38 years, Occ: Agriculture

2. Shri Kisan Dadaram Hadgale

(since deceased through his Legal heirs)

2A.Mainabai Kisan Hadgale,

Age: 40 years, Occ: Household

2B.Pappu Kisan Hadgale,

Age: 26 years, Occ: Education

2C.Supriya Kisan Hadgale,

Age: 24 years, Occ: Education

3.Shri Bapu Gangaram Virkar,

Age; 33 years, Occ: Agriculture

4.Jambukumar Sitaram Virkar

Age: 38 years, Occ: Agriculture

5.Shri Tulshirarn Dadaram Atole,

Age: 43 years, Occ: Agriculture

6. Shri Dadaram Sahebrao Gawade

Age: 53 years, Occ: Agriculture

7. Smt. Jayabai Balu Shingade,
(since deceased through her Legal heirs)

7a. Kausabai Vitthoba Atole

Age:- Adult, Occ:- Housewife

7b. Sushila Laxman Aarole

Age:- Adult, Occ:- Housewife

7a and 7b R/at. Saval, Tal.- Baramati

7c. Pandurang Balku Shingade

Age: Adult, Occ:- Agri.

R/at. Hagarewadi,

At/post Shelgao, Tal.- Indapur

Dist.- Pune

8. Sou, Thakubai Mahadu Kokane

Age: 43 years, Occ: Household

9. Smt. Kalubai Babu Awale, (dead)

(Resp, Nos. 7 and 8 are LR's. Of Resp. No.9)

10. Shri Rajendra Babu Awale,

Age: 29 years, Occ: Agriculture

R/o. Jalgaon, Tal. Baramati.

Dist. Pune.

11. Miss Mangal Babu Awale,

@Mangal Rajendra Khartode

Age; 25 years, Occ: Household

R/o. Nirgude, Tal. Indapur,

Dist. Pune.

12. Miss Chhabubai Babu Awale,

@Chhabubai Shivaji Pundkule

Age; 23 years, Occ: Household
R/o. Palasdeo, Tal. Indapur,
Dist. Pune.

13. Smt- Babai Babu Awale,
Age: 33 years, Occ: Agriculture
R/o. Jalgao, Tal. Baramati.
Dist. Pune.

14. Pokmari Dadaram Gawade
Age: 35 years, Occ: Agriculture

15. Sanjay Dadaram Gawade
Age: 34 years, Occ: Agriculture
Respondent No. 14 and 15
R/o. Tapovan Colony, near
Technical High School,
Baramati, Tal: Baramati,
Dist. Pune.

16. Chhayabai Dadaram Gawade
Age: 25 years, Occ: Agriculture
R/o. Avdhutnagar, near
Technical High School, Baramati,
Tal: Baramati, District: Pune

...Respondents

(Resp. Nos. 1 to 6 & 10 to 16 orig. defts. Resp.
Nos.7 to 9 orig. plff. No.1, 2 and 6)

Mr. Rahul Kate for the Appellants.

Mr. Abhijit P. Kulkarni a/w. Mr. Gaurav Shahane, Ms. Sweta Shah
for Respondent Nos.7 and 8.

Mr. Sushant Prabhune a/w. Ms. Mamta Pandey for Respondent
Nos.10, 12 and 13.

CORAM : SHARMILA U. DESHMUKH, J.

**RESERVED ON : 29th FEBRUARY 2024.
PRONOUNCED ON: 8th APRIL 2024.**

JUDGMENT:

1. *Vide* order dated 9th June 2015 the second appeal was admitted by this Court.

THE CHALLENGE:

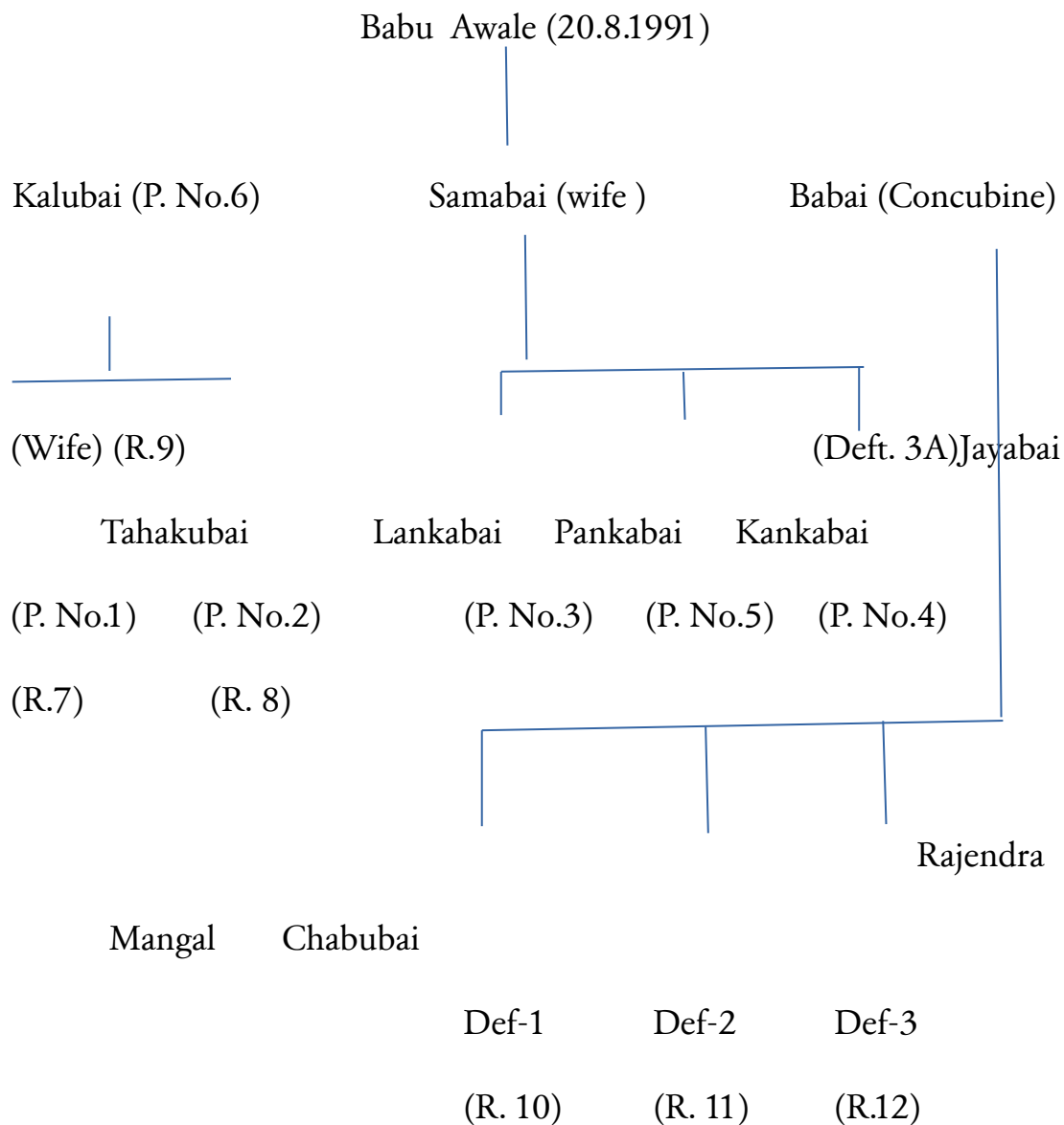
2. The modification of Clause 3 and 5 of Judgment and Decree dated 24th June 1997 of Trial Court in RCS No.130/1994 by the Appellate Court thereby re-determining the share of the Plaintiff No 1 and 2 to 1/54th share each and that of Plaintiff Nos 3 to 5 to 1/27th share each is challenged by the Original Plaintiff Nos 3 to 5. For the sake of convenience the parties are referred to by their status before the Trial Court.

PROCEEDINGS OF TRIAL COURT:

3. RCS No.130/1994 was filed by the Plaintiffs seeking partition and separate possession of land bearing Gat No.93 admeasuring 15 H 42 R of Village Saval, Tal: Baramati, for declaration that the alienation by the Defendant No 1 to 3 is not binding upon the Plaintiffs and for perpetual injunction.

4. The interse -relationship between the parties as reflected

from the genealogy given in the plaint is as under:



5. The propositus - Babu Awale expired on 20th August 1995. According to the Plaintiffs, Kalubai and Samabai were the legally wedded wives of Babu whereas Babai was his concubine. Babu did not have any sons and the plaintiff Nos.1 and 2 are daughters of Kalubai and plaintiff Nos.3 , 4 and 5 are the daughters of Samabai. The Defendant Nos 1 to 3

are begotten from Babai. After the death of Babu, parties were residing together however subsequently dispute arose and partition was demanded, which was denied. The Defendants were in the process of alienating some of the properties and on 18th April 1994 public notice was issued by the Plaintiffs and despite thereof and without having any legal right in the properties the Defendant No 1 to 3's mother Babai sold some properties to Defendant Nos.4 to 9. As such suit came to be filed.

6. The suit came to be resisted by the Defendants. The contention of Defendant Nos.1 to 3 was that the entire property was not brought in common hotch-pot. Babai was lawfully wedded wife of Babu and Defendant No.1 was a co-parcener. It was contended that in the year 1988, Babu had partitioned the suit property giving half share to Defendant No.1 and out of remaining 1/2 share, 1/4th share was given to Babai and balance 1/4th share was retained by Babu. It was contended that Babai has alienated her share for legal necessity.

7. Defendant Nos.4 to 9 contended that plaintiff No.6 Kalubai was not married to Babu. It was contended that Babu has partitioned the suit property in the year 1981-1982 during his lifetime and had given 1/2 share to the Defendant No 1 which is recorded in Mutation Entry No

2844. Subsequently in the year 1988, out of the balance $\frac{1}{2}$ share, $\frac{1}{4}$ th share was given to Babai. The revenue entries were recorded in name of Babai and she was the owner and in occupation of her share. Babai had sold her share to the Defendant No's 4 to 9 for legal necessity and the Defendant Nos.4 to 9 are *bona fide* purchasers for value without notice.

FINDINGS OF TRIAL COURT:

8. The Trial Court *vide* Judgment dated 24th July, 1997 decreed the suit declaring that Defendant No 3A-Babai is not related to the suit property and the sale transaction entered into by her with the Defendant Nos 4 to 9 is not binding upon the shares of the Plaintiffs. It was declared that the Plaintiff No 6 and Defendant No 1 have $\frac{10}{27}$ th share each and Plaintiff Nos 1 to 5 and Defendant Nos 2 and 3 have $\frac{1}{27}$ th share each in suit property.

9. The Trial Court held that marriage of Defendant No.3A Babai with Babu was void and that the sale by Defendant No.3A to Defendant Nos. 4 to 9 is illegal and not binding on the Plaintiffs. The Trial Court held that the Defendants have failed to prove that the entire property is not brought into common hotch-pot and that the partition by Babu during life time though proved was illegal. The Trial Court held

that Babu, Plaintiff No 6 and Defendant No 1 would have $1/3^{\text{rd}}$ share. As Babu had expired, his $1/3^{\text{rd}}$ share would be distributed between the Plaintiffs and the Defendant Nos 1 to 3. The Plaintiff No 6 and Defendant No 1 would get $1/3^{\text{rd}} + 1/27^{\text{th}}$ i.e. $10/27^{\text{th}}$ share and the Plaintiff Nos 1 to 5 and Defendant Nos 2 and 3 i.e. the daughters would have $7/25^{\text{th}}$ share.

APPELLATE COURT PROCEEDINGS

10. Regular Civil Appeal No.102/1997 was preferred only by the Defendant Nos.4 to 9. The Appellate Court upheld the findings of the Trial Court holding that the marriage of Babai being void and negating the theory of the partition by Babu during his life time being legal. As regards the share of the plaintiff, the Appellate Court held that there would be notional partition of the suit property amongst the deceased Babu, his legally wedded wife Kalubai and Defendant No.1 i.e. illegitimate son of Babu and each would get $1/3^{\text{rd}}$ share and that $1/3^{\text{rd}}$ share of Babu would devolve upon his daughters and widow i.e. Plaintiff Nos.1 to 6 and Defendant Nos.1 to 3. i.e. the children of Babai and therefore the share would be $1/27^{\text{th}}$ each and that the plaintiff No.6 and Defendant No.1 would get $1/3^{\text{rd}}$ plus $1/27^{\text{th}}$ i.e. $10/27^{\text{th}}$ share. The Appellate Court further observed that during pendency of the appeal, the

Plaintiff No.6 Kalubai had expired and therefore her 10/27th share would devolve upon her daughters i.e. plaintiff Nos.1 and 2 and as such their shares were determined at 12/54th each. The Appellate Court modified the decree and pass the following order:

“(1) The appeal is partly allowed.

(2) The impugned decree, dated 24.7.1997 passed by the Jt. C. J., J.D., Baramati in RCS No. 130/1994 so far as it relates to the shares of the parties and relief of perpetual in function as per Causes (3) and (S) is modified by substituting Clauses (3) and (5) as follows:

It is hereby declared that plaintiff Nos. 1 and 2 are entitled to 12/54th share each, plaintiff Nos. 3 to 5 and defendant Nos. 2 and 3 are entitled to 1/27th share each and defendant No.1 is entitled to 10/27th share in the suit land Gat No.93, 15 H 72 Ares situated at village Savel, Taluka Baramati. Plaintiff Nos. 1 to 5 are entitled to possession of their separate shares as above in the suit land. Defendant Nos. 1 to 3 are entitled to separate possession of their shares as above on payment of necessary Court Fees, Defendant Nos. 4 to 9 are hereby perpetually restrained from taking possession of the suit land or from cultivating the same till the suit land is partitioned by metes and bounds.

(3) Rest part of the impugned decree regarding cost of the suit, relief of declaration and partition of the suit land by

Collector respectively as per Clauses (1), (2) and (4) is maintained.

(4) Parties shall bear their costs of Appeal.”

SUBSTANTIAL QUESTION OF LAW FRAMED:

11. Second appeal was admitted on the following substantial questions of law:

Whether the defendant Nos.1, 2 and 3 who are held to be the illegitimate children of one Babu Awale, who expired on 20th August 1991, are entitled to share in the joint family property?

ADDITIONAL QUESTION OF LAW FRAMED:

12. The Trial Court's judgment and decree was challenged by the Defendant Nos 4 to 9 and no cross objections were filed by the Plaintiffs. The Plaintiffs thereby accepted the decree of Trail Court. Against the judgment passed in Defendant Nos 4 to 9's appeal, the Defendant Nos. 4 to 9 have not preferred Appeal and the present Second Appeal is at the instance of Plaintiffs. The Plaintiff being the non-appealing party, the issue was whether the decree could be re-opened. Learned counsel for parties advanced rival submissions on the power of the Appellate Court under Order 41 Rule 33 of CPC to pass a decree in favour of the non appealing party. Mr. Kate would submit that under Order 41 Rule 33 of

CPC in order to do complete justice, relief can be granted even to non appealing Plaintiffs whereas Mr. Prabhune would contend that the provision does not enable the re-opening of decrees which have become final. In my view, considering the facts of instant case, the following additional question of law is required to be framed:

“Whether in the instant case the decree of partition had become final which could not be re-opened under Order 41 Rule 33 of CPC at the instance of the Plaintiffs who have not appealed against the Trial Court’s decree nor filed any cross objection?”

SUBMISSIONS:

13. Heard Mr. Rahul Kate, learned Counsel for the Appellants, Mr. Abhijit P. Kulkarni , learned Counsel for Respondent Nos.7 and 8 and Mr. Sushant Prabhune, learned Counsel for Respondent Nos.10, 12 and 13.

14. Mr. Kate, Learned counsel for the Appellants would submit that the Plaintiff’s share is required to be enhanced in view of settled position of law. He submits that the Appellate Court has applied the law erroneously. He submits that the Apex Court in case of ***Revanasiddappa vs. Mallikarjun, (2023) 10 SCC 1*** has held that a child born from a void marriage whose legitimacy is protected by Section 16(1) of Hindu

Marriage Act, 1955 would be entitled to share in the property which will be allotted to his parent and is not entitled to a share in the notional partition itself. He would submit that applying the law laid down by the Apex Court upon notional partition there would be seven shares and Babu's $1/7^{\text{th}}$ share would devolve upon all i.e. 9 persons i.e. $1/63^{\text{rd}}$ share each. So, Plaintiffs will be entitled to $1/7^{\text{th}} + 1/63^{\text{rd}}$ share each i.e. $10/63^{\text{rd}}$ share and the Defendant No 1 to 3 will get $1/63^{\text{rd}}$ share each (as children from void marriage). He would further submit that although the Plaintiffs had not appealed against the judgment of the Trial Court the Apex Court in the case of *Azgar Barid (D) by Lrs. And Ors. vs. Mazambi @ Pyaremabi and Ors., (2022) 0 AIR (SC) 1304* has held that under Order 41 Rule 4 and 33 of CPC, the Court can grant leave to non appealing Plaintiffs and make an adverse order against the Defendant and in favour of all Plaintiffs. He submits that in the present case the suit being for partition all Plaintiffs and Defendants stand on equal footing and even though the Plaintiffs have not preferred appeal, the Plaintiffs are entitled to seek relief. In support he relies upon the following decisions:

1. *Azgar Barid (D) by Lrs. And Ors. vs. Mazambi @ Pyaremabi and Ors., (2022) 0 AIR (SC) 1304 ;*
2. *Revanasiddappa vs. Mallikarjun, (2023) 10 SCC 1;*

3. *Raja Gounder and Ors. vs. M. Sengodan and Ors., SLP (C) No.13486/2007.*

15. *Per contra*, Mr. Prabhune, learned counsel appearing for the Original Defendant Nos.1, 3 and 3A i.e. Respondent Nos 10, 12 and 13 would submit that after the suit was decreed, the decree was challenged by the transferees from Defendant No.3A. The Plaintiffs did not appeal against the decree of the Trial Court and the First appeal was dismissed only modifying the share for the reason that during the pendency of the appeal, the plaintiff No.6 expired and her share went to the Plaintiff Nos 1 and 2. He would submit that the decision in the case of *Azgar Barid (D) by Lrs. And Ors. vs. Mazambi @ Pyarembi and Ors. (supra)* is distinguishable on facts. He would submit that the shares of the Plaintiffs were enhanced and as such the Plaintiffs are not aggrieved party in the Second Appeal. He would further submit that under Order 41 Rule 33 of CPC the decree cannot be reopened at the instance of the Plaintiffs who have not appealed against the decree of the Trial Court nor filed any cross objection. In support he relies upon the following decisions:

1. *Nirmala Bala Ghose vs. Balai Chand Ghose , 1965 Go Juris (SC) 98;*

2. *Surajballi Sah vs. State of Bihar, 1981 Go Juris (SC) 488;*

3. Eastern Coalfields Limited and Ors. vs. Rabindra Kumar Bharti, 2022 Livelaw (SC) 374;

4. Venukuri Krishna Reddi and Anr. vs. Kota Ramireddi and Ors., AIR 1954 Madras 848.

5. Sangramsingh Premsingh Thakur vs. Smt. Sarlabi Chhotelal Thakur, 2015(6) ALL MR 528

REASONS AND ANALYSIS:

16. The concurrent findings of the Trial Court and the Appellate Court holding that the marriage of Babai with Babu is void marriage has attained finality, Babai is thus not entitled to any share in the joint family property. The Defendant Nos 1 to 3 are born from void marriage however their legitimacy is protected under Section 16(1) of Hindu Marriage Act, 1955. The Apex Court in *Revanasiddappa vs. Mallikarjun*.(supra) was considering the issue of whether a child who is conferred with legislative legitimacy under Section 16(1) or 16(2) of Hindu Marriage Act, 1956 is by reason of Section 16(3) entitled to the ancestral/coparcenary property of the parents or is the child merely entitled to the self earned/separate property of the parents. The Apex Court formulated its conclusion relevant for our purpose in paragraph 54 (iii), (viii), (ix) and (x) as under:

“(iii) While conferring legitimacy in terms of Sub-Section (1)

on a child born from a void marriage and under Sub-Section (2) to a child born from a voidable marriage which has been annulled, the legislature has stipulated in sub-section (3) of Section 16 that such a child will have rights to or in the property of the parents and not in the property of any other person.

(viii) While providing for the devolution of the interest of a Hindu in the property of a Joint Hindu family governed by Mitakshara law, dying after the commencement of the Amending Act of 2005 by testamentary or intestate succession, Section 6 (3) lays down a legal fiction namely that the coparcenary property shall be deemed to have been divided as if a partition had taken place. According to the Explanation, the interest of a Hindu Mitakshara coparcener is deemed to be the share in the property that would have been allotted to him if a partition of the property has taken place immediately before his death irrespective of whether or not he is entitled to claim partition;

(ix) For the purpose of ascertaining the interest of a deceased Hindu Mitakshara coparcener, the law mandates the assumption of a state of affairs immediately prior to the death of the coparcener namely, a partition of the coparcenary property between the deceased and other members of the coparcenary. Once the share of the deceased in property that would have been allotted to him if a partition had taken place immediately before his death is ascertained, his heirs including the children who have been conferred with legitimacy under Section 16 of the

HMA 1955, will be entitled to their share in the property which would have been allotted to the deceased upon the notional partition, if it had taken place;

(x) The provisions of the HSA 1956 have to be harmonized with the mandate in Section 16(3) of the HMA 1955 which indicates that a child who is conferred with legitimacy under Sub-Sections (1) and (2) will not be entitled to rights in or to the property of any person other than the parents. The property of the parent, where the parent had an interest in the property of a Joint Hindu family governed under the Mitakshara law has to be ascertained in terms of the Explanation to sub-section (3), as interpreted above.”

17. The law laid down by the Apex Court is that the child whose legitimacy is protected under Section 16(1) and (2) of Hindu Marriage Act, 1955 will have rights to or in the property of the parents and not in the property of any other person. In the context of joint family property governed by Mitakshara law, the Apex Court has held that the children who have been conferred legislative legitimacy will be entitled to their share in the property which would have been allotted to the deceased upon the notional partition, if it had taken place.

18. It is settled by decision of Apex Court in ***Vineeta Sharma vs***

Rakesh Sharma (2020) 9 SCC 1 in the context of amended Section 6 of the Hindu Succession Act, 1956 that the conferral of the right upon the daughters is by birth and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. The proviso to Section 6 protecting the disposition or alienation taking place before the 20th day of December, 2004.

19. In the present case, the Courts have rendered a finding that the partition alleged to have taken place during the life time of Babu is a illegal partition. The finding is that Babai i.e. Defendant No 3A was not entitled to any share in the joint family property and the Plaintiff No 6 who was the legally wedded wife of Babu was not allotted any share in the partition. The partition was thus held to be illegal which finding has attained finality. The net result of the findings of the Courts is that there was no partition of the joint family property, Babai is not legally wedded wife of Babu and has no right in the property and the shares of the Plaintiffs and Defendant Nos. 1 to 3 in the joint-family property has to be determined

20. Applying the above enunciation of law to the facts of the

present case, as the marriage of Babai and Babu have been declared void, their children i.e. Defendant Nos 1 to 3 would be entitled to share in the property which would have been allotted to the deceased Babu upon notional partition taking place. The Plaintiff Nos 1 to 5 are the daughters of Babu born from lawful marriage and Plaintiff No 6 is the legally wedded wife of Babu. Upon notional partition taking place, each would be entitled to $1/7^{\text{th}}$ share. Babu's $1/7^{\text{th}}$ share would devolve upon 9 persons which will include Defendant Nos 1 to 3 and thus Plaintiffs would be entitled to $1/7^{\text{th}}$ share plus $1/63^{\text{rd}}$ share each i.e. $10/63^{\text{rd}}$ share. The Defendant Nos 1 to 3 would get $1/63^{\text{rd}}$ share each.

21. The Trial Court granted $1/3^{\text{rd}}$ share to the Defendant No 1 in the joint family property as well a share in the $1/3^{\text{rd}}$ share of Babu which could not have been granted as Defendant No.1 was born from void marriage. The only entitlement of the Defendant Nos 1 to 3 was share in the share of Babu upon notional partition being effected.

22. This determination of share of the Defendant Nos 1 to 3 have not been countered by Mr. Prabhune, learned Counsel for the Respondent Nos. 10, 12 and 13. His contention is that under Order 41 Rule 33 of CPC the decree cannot be re-opened at the instance of non

appealing parties. It would be profitable to have a look at Order 41 Rule 33 of CPC which reads thus:

“33. Power of Court of Appeal--- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross - suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:
[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]”

23. It will be thus necessary to consider whether decree of Trial Court has attained finality which cannot be re-opened. The submission of Mr. Prabhune overlooks the aspect that the suit has been filed seeking partition and separate possession. The decree passed by the Trial Court determining the shares of the parties is a preliminary decree. In ***Prema vs Nanje Gowda (AIR 2011 Supreme Court 2077)*** the issue presented for

consideration of Apex Court was whether the Appellant who failed in her challenge to the preliminary decree passed in a suit for partition filed by Respondent No 1 could seek enhancement of her share in the joint family property in the final decree proceedings in terms of Section 6A of Hindu Succession Act, 1956 amended by Hindu Succession (Karnataka Amendment Act), 1990. The Apex Court in facts of that case held that by the preliminary decree the shares of the parties were determined but the actual partition/division had not taken place. Hence the proceedings in the suit instituted by the Respondent No 1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned. The Apex Court held that the view taken by the Trial Court and High Court that the Appellant was not entitled to benefit of amendment because she had not challenged the preliminary decree by joining the Defendants in filing the second appeal is a erroneous view. The Apex Court held that as the final decree proceedings were pending, the Appellant had every right to seek enlargement of her share.

24. The above decision of the Apex Court is the complete answer to the submission of Mr. Prabhune that the decree cannot be reopened at the instance of the non-appealing Plaintiffs. The decree being preliminary decree, the Plaintiffs were entitled to seek enhancement of their share

despite not having challenged the preliminary decree.

25. The decision of *Azgar Barid (D) by Lrs and Others vs Mazambi @ Pyaremabi and Others (supra)* relied upon by Mr. Kate is squarely applicable to the facts of the present case. In facts of that case, in suit for partition, the Plaintiff No 2 and 3 were held entitled to share in suit properties. The Defendant No 1 challenged the decree of the Trial Court which was allowed. In challenge to the judgment of 1st Appellate Court, the High Court re-determined the shares of the parties. The Defendant No 1 approached the Apex Court with the contention that the Trial Court had decreed the suit only in favour of Plaintiff Nos 2 and 3, which was challenged only by Defendant No 1 and not by Plaintiff Nos 4 to 8. Thus the second appeal at behest of Plaintiff Nos 4 to 8 was not tenable. The Apex Court noted the decision of *Chandramohan Ramchandra Patil and Others vs Bapu koyappa Patil (Dead) through Lrs and Others (2003) 3 SCC 552* which had held that Order 41 Rule 33 of CPC empowers the Appellate Court to do complete justice between the parties by passing such order or decree although not all the parties affected by the decree had appealed and that in such situation it is not open to urge on behalf of the Defendants that the decree of dismissal of suit passed by the Trial Court had become final inter se between the non appealing

Plaintiffs and Defendants.

26. The decree passed by the Trial Court was a preliminary decree. By said decree, the Trial Court had granted share to the defendant No.1. in the Joint Family property contrary to the position as enunciated by the Apex Court in *Revansidappa vs. Mallikarjun (supra)*. As there was no actual division of the shares in final decree proceedings, in exercise of powers under Order 41 Rule 33 of CPC the shares of Plaintiffs could be enhanced in order to do complete justice despite the Plaintiffs not appealing against decree of Trial Court.

27. The decision of *Nirmala Bala Ghose vs Balai Chand Ghose (supra)* relied upon by Mr. Prabhune was rendered in context of a decree which had attained finality. In that case two suits came to be filed seeking declaration of ownership of the properties and for a declaration that the plaintiff's wife Nirmala is *benamidar* for him and that the deed of dedication did not amount to an absolute dedication of the properties to the deities. The Suit came to be decreed and Nirmala was declared as *benamidar* of the suit properties. In appeal the Calcutta High Court modified the decrees holding that there was partial dedication in favour of deities. The matter was taken to the Apex Court and the Apex Court

noted that in one of the suit filed by the Plaintiffs against two deities, the plaintiff and his wife Nirmala sought to represent the deities and on objection raised guardian was appointed. The guardian did not challenge the decree passed by the Trial Court as regards the absolute dedication and Nirmala had appealed and contended that there was absolute dedication in favour of deities. The Apex Court considered that decree against two deities has become final as no appeal was preferred to the High Court by the deities and it was not open for Nirmala to challenge the decree in so far as it was against the deities as she did not represent deities. Pertinently, the Apex Court noted that Nirmala is not seeking to claim a more exalted right under the deed for herself, which may require reexamination of the correctness of the decision of the Courts. It is in that context the Apex Court held that power under Order 41 Rule 33 of CPC does not confer an unrestricted right to re-open the decrees which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from. As noted above, the facts of the case are clearly distinguishable and inapplicable in the present case.

28. The next decision pressed into service by Mr. Prabhune is *Choudhari Sahu Surajballi Sah vs. State of Bihar (supra)*. In that case notice was issued to the petitioner calling upon him to submit returns in

respect of lands held by him and order came to be passed by the Collector and the petitioner being aggrieved went up in appeal. However the State of Bihar submitted to the order and did not go in appeal and the Appeal came to be allowed and the matter was remanded to the Collector for disposal. The Appellant did not challenge the findings recorded by the Collector regarding the units allotted to him however the Commissioner has set aside the findings of the Collector even regarding the units allotted to the Appellant despite no appeal having being preferred by the State of Bihar. The contention was that in absence of any appeal or cross objection filed by the State of Bihar the findings in favour of the Appellant could not have been reversed. In that context, the Apex Court held that the power under Order 41 Rule 33 of CPC has to be exercised with care and caution and does not confer an unrestricted right to open decrees which have become final. The facts of the said case would demonstrate that the Apex Court was considering a completely different factual scenario.

29. As regards the decision in the case of *Eastern Coalfields Limited and Ors. vs. Rabindra Kumar Bharti (Supra)* the Apex Court in the facts of that case held that it was not a fit case in which the High Court could have supported the directions under Order 41 Rule 33 of CPC. In that case, there was a departmental proceedings held by the Appellant and

the High Court had directed that order of dismissal against the Respondent would become operative on the criminal proceedings culminating in order of conviction, which direction was passed under Order 41 Rule 33 of CPC. The said decision is clearly inapplicable.

30 The next decision is of Madras High Court in ***Venukuri Krishna Reddi and Anr. vs. Kota Ramireddi and Ors., (supra)***. The issue which arose before the High Court was whether the dismissal of the suit by the lower appellate Court not only against those Defendant who had preferred the appeal but even against those who have not was proper and legal. The Madras High Court considered the provisions of Order 41 Rule 33 of CPC and held that the Court might exercise power under that Rule in the interest of justice but subject to exceptions. On such exceptions the Court will exercise sound discretion in refusing to grant relief to one who has submitted to the decree. The said decision does not lay down as an absolute proposition of law that provisions of Order 41 Rule 33 of CPC cannot be invoked for the purpose of doing complete justice between the parties apart from the fact that the decision is not binding upon this Court and only has a persuasive value.

31. The next decision is in the case of ***Sangramsingh Premsingh***

Thakur vs. Smt. Sarlabi Chhotelal Thakur, (supra) where learned Single Judge of this Court was considering the issue as to whether the power under Order 41 Rule 33 of CPC can be invoked in the absence of any appeal or cross objections by the Respondent. In that case, the suit was filed for possession of the suit property and the defence of the Defendant was it was a joint family property which was not partitioned. The suit came to be dismissed by the Trial Court on the ground of limitation after answering all issues in favour of the plaintiff. The Appellate Court reversed the findings of the Trial Court on the question of limitation. It is in that context the provisions were considered. The Learned Single Judge held that as no cross objection was filed by the Respondent answering the issues in favour of the plaintiff, the power must be held to be limited lest it diminishes the requirement contemplated by Rule 22 of Order 41 of CPC. The subject matter of the suit in that case did not result into preliminary decree being passed and in all the decisions relied upon by Mr. Prabhune final decree was passed which was the subject matter of consideration at the appellate stage. As indicated above in the present case what was under challenge before the first Appellate Court was the preliminary decree and not a final decree and as such the Plaintiffs were entitled to seek enhancement of their share despite not having challenged the same.

CONCLUSION:

32. In light of the discussion above, the Defendant Nos.1 to 3 who are the children born from the void marriage of Babu and Babai are not entitled to share in the joint family property. The Defendant Nos.1 to 3 would be entitled to a share in the share which would be allotted to Babu upon notional partition being effected. The Defendant Nos.1 to 3 would therefore be entitled to $1/63^{\text{rd}}$ share each out of Babu's $1/7^{\text{th}}$ share as there are nine sharers.

33. In the present case, as the decree of the Trial Court was a preliminary decree as admittedly the shares of the parties were determined but partition/division has not taken place, the decree could not have been treated as final and even though the Plaintiffs had not appealed against the decree of Trial Court, in exercise of powers under Order 41 Rule 33 of CPC, for the purpose of doing complete justice to the Plaintiffs, the share of the Plaintiffs can be enhanced even if the Plaintiffs have not preferred an Appeal. The re-determination of shares in present case would not amount to re-opening of decree of partition.

34. The substantial questions of law are answered accordingly in

favour of the Appellant. Appeal succeeds. Clause (3) of the Judgment and Decree of the Trial Court dated 24 July 1997 is modified and (3A) is added as under :

(3) Plaintiff Nos.1 to 6 would be entitled to $1/7^{\text{th}}$ share of the suit property. Babu's $1/7^{\text{th}}$ share will devolve upon the Plaintiffs and Defendant Nos.1 to 3 i.e. $1/63^{\text{rd}}$ share each. The Plaintiffs would therefore be entitled to $1/7^{\text{th}}$ plus $1/63^{\text{rd}}$ i.e. $10/63^{\text{rd}}$ share each and Defendant Nos.1 to 3 would be entitled to $1/63^{\text{rd}}$ share.

(3A) Plaintiff No.6-Kalubai having expired her share would devolve equally upon plaintiff Nos.1 and 2.

Decree be drawn up accordingly.

(SHARMILA U. DESHMUKH, J.)