

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.322 OF 2024

Santosh Vilasrao Yadav and Ors. ... Applicants

V/s.

Shailendra Vilasrao Yadav and Ors. ... Respondents

Mr. Kalpesh U. Patil, for the applicants.

Mr. Surel Shah, Senior Advocate, i/by Dhananjayrao Rananaware, for the respondent no. 1.

CORAM : N.J. JAMADAR, J.

RESERVED ON : 17th FEBRUARY 2025.

PRONOUNCED ON : 9th JUNE 2025.

ORDER:

1. This revision is directed against an order dated 21st December 2023, passed by the learned Civil Judge, Karad whereby an application preferred by the applicants/defendants nos. 2 and 5 for rejection of the plaint (Exhibit-138) under the provisions of Order VII Rule 11 of the Civil Procedure Code, 1908 (the Code) came to be rejected, along with an application for the same relief (Exhibit-126) preferred by the defendant no. 7.

2. The background facts can be stated in brief as under:

2.1 For the sake of convenience and clarity the

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parties are hereinafter referred to in the capacity in which they are arrayed before the learned Civil Judge.

2.2 The respondent nos. 1 and 2 are the plaintiffs in Special Civil Suit No 13 of 2018. Respondent nos. 1 and 2 instituted the suit for partition and separate possession of their 2/5th share in the purported joint family properties described in para nos. 1, 2 and 4(b) of the plaint.

2.3. Vilasrao, (D-1) is the father of the plaintiffs and defendant nos. 2 and 3. The marriage of Vilasrao was solemnized with Suman, in the year 1971. Defendant nos. 2 and 3 were born to Suman by Vilasrao. In the year 1978, Vilasrao (D-1) solemnized marriage with Ranjana (D-4). The plaintiffs were born to Ranjana by Vilasrao (D-1). Sunita (D-5) is the wife of Santosh. Reshma (D-6) is the wife of Shailendra (P-1).

2.4. The plaintiffs assert that, after a few years of the marriage of Vilasrao with Ranjana (D-4), there was a settlement between the parties. The cohabitation between Vilasrao and Suman, the first wife, resumed. The defendant no. 1, plaintiff, their mother Ranjana (D-4), Suman and

defendant nos. 2 and 3 started to reside in a joint family. Various properties were acquired out of the joint family business. The suit properties described in Para No. 1, 2 and 4(a) are the joint family properties of the plaintiff and defendant nos. 1 to 3. There has not been a partition by metes and bound between the plaintiff and defendant no. 1 to 3. They are in common enjoyment. The businesses which are run from the suit properties are the joint family businesses.

2.5. Various properties have been purchased in the names of plaintiff no. 1 and defendant no. 2, out of the joint family funds. In particular, the property described in Para no. 3 of the plaint i.e. plot No. H-36 was taken on lease from MIDC in the name of defendant no. 2. A powerloom business was started in the said plot out of the joint family funds. The plaintiff no. 1 had also contributed amount for the construction of the shed, and commencement of the said business.

2.6 Defendant no. 2 allegedly borrowed money purportedly for the said business by creating security

interest over the joint family properties, without the consent of the other co-shares. The amount of loan were not used for the said business and the defendant no. 2 converted the same for his own use. Therefore, the plaintiffs called upon the Defendant no. 2 to partition the joint family properties. Defendant no.2 declined the request of the plaintiffs. Hence, the suit for partition and separate possession and a declaration that the security interest created by the Defendant nos. 2 and 5 over the property described in para no. 3 of the plaint is not binding on the share of the plaintiffs.

3. The defendant nos. 2 and 5 filed an application for rejection of the plaint on the ground that from the perusal of the averments in the plaint, it becomes evident that Vilasrao (D-1) had solemnized marriage with Ranjana (D-4) during the lifetime of Suman, the mother of defendant nos. 1 and 3, and the plaintiffs were born to Ranjana by Vilasrao (D-1) and, therefore, the plaintiffs were not the legitimate children of Vilasrao (D-1). Consequently, during the lifetime of Vilasrao (D-1) the plaintiffs had no right to seek partition in the ancestral and joint family properties of Vilasrao (D-1). The plaintiffs

are entitled to succeed only to the share of Vilasrao (D-1), after his demise. Therefore, on this sole ground the plaint was liable to be rejected.

4. The defendant no. 7 Bank had filed an application for rejection of the plaint for want of prior notice under Section 164 of the Maharashtra Cooperative Societies Act, 1960.

5. By the impugned order, the learned Civil Judge was persuaded to reject both the applications. With regard to the ground raised by the applicants/defendant nos. 2 and 5, the learned Civil Judge was of the view that, there was no material to record a positive finding that the marriage between Vilasrao (D-1) Ranjana (D-4) was solemnised during the subsistence of the marital bond between Vilasrao (D-1) and Suman and it was void. Nor can it be inferred that the plaintiffs were not the legitimate children of Vilasrao (D-1), without providing an opportunity to the parties to adduce evidence.

6. In view of the decision of the Supreme Court in the case of *Revanasiddappa and Another Vs. Mallikarjun and Ors.*¹ even the children born out of the void or voidable marriage were entitled to a share in the property of their parents. The trial Court was also of the view that, where the father or the step brothers/sisters were disputing

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their right, such children were entitled to institute a suit seeking partition and separate possession of their share.

7. Being aggrieved, the defendant nos. 2 and 5 have invoked the revisional jurisdiction of this Court.

8. I have heard Mr. Kalpesh Patil, the learned counsel for the applicants, and Mr. Shah, learned Senior Advocate, for the respondent no. 1, at some length. With the assistance of the learned counsel for the parties, I have perused the material on record, especially the averments in the plaint.

9. Mr. Kalpesh Patil, the learned counsel for the applicants, submitted that the learned Civil Judge committed a manifest error in law in returning a finding that the applicants were entitled to institute a suit for partition during the lifetime of their father. In the process, Mr. Kalpesh Patil would urge, the learned Civil Judge completely misread the averments in the plaint. From the averments in the plaint no other inference than that of the marriage between Vilasrao (D-1) and Ranjana (D-4) having been solemnized while Suman (mother of the Defendant nos. 1 and 3) was still alive, can be drawn. It is the case of the plaintiffs that Vilasrao (D-1) solemnized marriage with Ranjana (D-4) in 1978 and thereafter there was settlement of the dispute

between Vilasrao and Suman and they co-habited together. In the face of these pleadings, the learned Civil Judge could not have held that the question as to whether the marriage between Vilasrao (D-1) and Ranjana (D-4) was void and plaintiffs were born out of such a void marriage was required to be decided at the trial.

10. Mr. Kalpesh Patil would further urge that, the trial Court also completely misconstrued the ratio of the three Judge Bench Judgment in the case of *Revanasiddappa* (supra). The Supreme Court has, in terms, enunciated that the children born out of void or voidable marriage will have rights to or in the property of the parents and not the property of any other person. The plaintiffs can, thus, only succeed to estate of the Vilasrao (D-1), upon his demise.

11. Mr. Kalpesh Patil submitted that the decision rendered by the learned Single Judge in the case of *Vasant Ramchandra alias Chander Yelvande and Ors. Vs. Gurudas Vasantrao Yelvande and Ors.*² applies with full force to the facts of the case at hand as it was delivered in an almost identical fact-situation.

12. In the case of *Vasant Ramchandra alias Chander Yelvande* (supra), after referring to the previous pronouncements on the right of the children to property, born out of the void and voidable marriage,

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this Court had categorically held that rights of the plaintiffs therein to the properties of their father would arise only when the succession opened upon the death of their father and not during his lifetime. Therefore, the plaintiffs had no existing right to sue. Thus, this Court had set aside the order passed by the trial Court and rejected the plaint, under the provisions of Order VII and Rule 11 (a) and (d) of the Code.

13. Per contra, Mr. Shah, learned Senior Advocate for the respondent nos. 1 and 2 / plaintiffs submitted that, the application for rejection of the plaint proceeded on an incorrect premise that the suit properties are ancestral properties. On the contrary, if the averments in the plaint are read as a whole an inference becomes inescapable that the suit properties were jointly acquired by the plaintiffs and defendants out of joint family businesses. Therefore, the very premise of the application that the plaintiffs are seeking partition of the joint family properties during the lifetime of their father and, therefore, the suit is not maintainable, is faulty. Mr. Shah would urge that in the written statement the defendant no. 1, the father of the plaintiffs and defendant no. 2, has categorically supported the case of the plaintiffs. Thus, the case must proceed for trial, urged Mr. Shah.

14. It is trite that while considering an Application for rejection of the Plaint under Order VII Rule 11 of the Code, only the averments in the Plaint are required to be considered, along with the documents which are annexed to the Plaint and thus form part and parcel of the Plaint. The defence of the Defendant or for that matter the contentions in the Application for rejection of the Plant, with regard to the merits of the rival claims, are not germane to the enquiry and need not be delved into. The averments in the Plaint are, however, required to be read in a meaningful and not formalistic manner. The Court has to be on guard that an illusion of cause of action is not created by resorting to clever drafting. The test to be applied is, if the averments in the Plaint are taken as they stand would the Plaintiff succeed.

15. In the case at hand, the averments in the Plaint make it abundantly clear that the Plaintiffs who are the children born to Ranjana (D4) by Vilasrao (D1) have made no effort to shy away from the fact that the marriage of Ranjana (D4) was solemnized with Vilasrao (D1) in the year 1978 during the subsistence of the martial bond between Vilasrao (D1) and Suman, the mother of Defendant Nos. 1 and 3. Nay the Plaintiffs assert that after the Plaintiffs were born to Ranjana (D4) there was settlement between Vilasrao (D1), their father, and Suman, the first wife of Vilasrao (D1), and they all started to reside together.

16. In the face of the aforesaid pleadings, I find substance in the submission of Mr. Kalpesh Patil that the Trial Court could not have observed

that it was necessary to provide an opportunity to the parties to lead evidence to determine the question as to whether the marriage between Vilasrao (D1) and Ranjana (D4), which was incontrovertibly solemnized during the subsistence of the marriage between Vilasrao (D1) and Suman, was void. Mere denial by the Plaintiffs that the marriage between Vilasrao (D1) and Ranjana (D4) was void, was not sufficient to make the validity of the marriage between Vilasrao (D1) and Ranjana (D4), a matter for trial. The Trial Court thus ought to have proceeded on the premise that, *prima facie*, the marriage between Vilasrao (D1) and Ranjana (D4) appeared to be void and taken into account the consequences that emanated therefrom with regard to the claim of the Plaintiffs especially on the aspect of their entitlement to seek partition of the suit properties.

17. By the Amendment Act 1976, Section 16 of the Hindu Marriage Act 1955 came to be amended so as to confer legitimacy on children of void and voidable marriages. The Parliament, at the same time, was anxious to balance the rights of the children born out of void and voidable marriages to the property lest the institution of coparcenary would have been affected if the legitimacy conferred on the children of such void and voidable marriages would place them at par with the children, who acquire right by birth. The Parliament thus declared under sub-Section (3) of Section 16 that nothing contained in sub-section (1) or sub-section (2) of Section 16 shall be construed as conferring upon any child born out of void or voidable

marriage, any rights in or to the property of any person, other than their parents. Section 16 of the Hindu Marriage Act 1955 reads as under:

“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.”

18. It would be contextually relevant to note the provisions contained in the Hindu Succession Act 1956. Under Section 3(j) of the Hindu Succession Act 1956, “related” means related by legitimate kinship:

Provided that such illegitimate children shall be deemed to be related to their mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

20. The provisions contained in Hindu Succession Act 1956 are, however, required to be read harmoniously with the provisions contained in Section 16 of the Hindu Marriage Act 1955. Thus construed, once the legitimacy is conferred by the provisions contained in Section 16(1) and (2) of the Hindu Marriage Act 1955, the provisions contained in Section 3(j) of the Hindu Succession Act 1956 would not dent the rights of such child. The limitation on the right to succeed to property as envisaged by sub-Section (3) of Section 16, however, deserves to be kept in view.

21. In the case of **Revanasiddappa (Supra)**, the Three Judge Bench of the Supreme Court expounded the interplay between provisions contained in the Hindu Marriage Act and Hindu Succession Act. The observations in paragraphs 73 and 76 are instructive. They read as under:

“73. Noticing this consequence, Section 16 was enacted by Parliament and its ambit was widened by the Amending Act of 1976. While conferring legitimacy, Parliament was nonetheless cognizant of the consequence of the conferment of legitimacy. If legitimacy were not to be conferred, this would affect, on the one hand, the rights of children born from void or voidable marriages: though the relationship of the parents may not be sanctioned by law, the child born from such marriage would have been

stigmatized as “illegitimate”. Parliament stepped in to obviate such a consequence by enacting Section 16. At the same time, Parliament was cognizant of the fact that protecting a child born from a void or voidable marriage from the consequence of ‘illegitimacy’ and conferring legitimacy on such a child, would have consequences on the right to property of parents and persons other than the parents. Section 16(3) represents a balancing act by the legislature when it stipulates that a child who is legitimate in terms of sub-sections (1) or (2) of Section 16 would have rights in or to the property only of the parents and not of any other person. The conferment of the status of legitimacy would, therefore, not affect the rights in or to the property of any other person other than the property of the parents. While enacting these provisions in the HMA 1955, Parliament was cognizant of the settled principles and concepts governing Joint Hindu families governed by Mitakshara law, the coparcenary and coparcenary property. While enacting the HSA 1956, the legislature did not intend to destroy these institutions which had an identified connotation. Parliament, it is true, regulated the devolution of interest in coparcenary property and provided, among other things, rules of succession in the case of male and female Hindus, the order of succession, and the principles governing the distribution of property.

... ..

76. The amendments have built upon the structure of the HUF and calibrated it to facilitate the legislative intent of bringing about gender equality within the fold of the institution. But the legislature has not stipulated that a child whose legitimacy is protected by sub-section (1) or sub-section (2) of Section 16 of the HMA 1955, would become a coparcener by birth. On the other hand, the express language used in sub-section (3) of Section 16

of the HMA 1955 is that the conferment of legitimacy shall not be construed as conferring any rights in or to the property of any person other than the parents. As we have already noted earlier, the very concept of a coparcener postulates the acquisition of an interest by birth. If a person born from a void or voidable marriage to whom legitimacy is conferred by sub-sections (1) or (2) of Section 16 were to have an interest by birth in a Hindu Undivided Family governed by Mitakshara law, this would certainly affect the rights of others apart from the parents of the child. Holding that the consequence of legitimacy under sub-sections (1) or (2) of Section 16 is to place such an individual on an equal footing as a coparcener in the coparcenary would be contrary to the plain intendment of sub-section (3) of Section 16 of the HMA 1955 which recognises rights to or in the property only of the parents. In fact, the use of language in the negative by Section 16 (3) places the position beyond the pale of doubt. We would therefore have to hold that when an individual falls within the protective ambit of sub-section (1) or sub-section (2) of Section 16, they would be entitled to rights in or to the absolute property of the parents and no other person.”

(emphasis supplied)

22. The conclusions in paragraphs 81.3, 81.4 and 81.10 of the aforesaid judgment are also material in the context of the controversy at hand. They read as under:

“81.3. 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;

81.4. While construing the provisions of Section 3(1)(j) of the HSA 1956 including the proviso, the legitimacy which is conferred by Section 16 of the HMA 1955 on a child born from a void or, as the case may be, voidable marriage has to be read into the provisions of the HSA 1956. In other words, a child who is legitimate under sub-section (1) or sub-section (2) of Section 16 of the HMA would, for the purposes of Section 3(1)(j) of the HSA 1956, fall within the ambit of the explanation ‘related by legitimate kinship’ and cannot be regarded as an ‘illegitimate child’ for the purposes of the proviso;

... ..

81. 10. 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.”

(emphasis supplied)

23. In the case of **Vasant Ramchandra Alias Chander Yelvande (Supra)** on which a very strong reliance was placed by Mr. Kalpesh Patil, while the aforesaid reference to the larger Bench in the case of **Revanasiddappa**

(Supra) was yet to be decided, a learned Single Judge of this Court, in terms held that for the children born to the second wife, who are rightfully called as “legitimate”, their right to get share, whether in the coparcenary 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. A Suit for partition of such property, therefore, cannot be maintainable during the lifetime of their parents.

24. In the said case, evidently, the Plaintiffs therein, had approached the Court with a case that the Suit properties were the ancestral joint family properties of their father against whom the Suit was instituted. In that context, the aforesaid law was enunciated.

25. Reverting to the facts of the case, from the perusal of the averments in the Plaint, it becomes abundantly clear that though the Plaintiffs have asserted that the Plaintiffs and Defendants are the members of the joint family, yet, nowhere the Plaintiffs claim that any of the suit properties is the ancestral property. On the contrary, it has been specifically asserted that the Plaintiffs and Defendants including Suman, the mother of Defendant Nos. 1 and 3 resided together and carried on joint family businesses and out of those joint family businesses, the suit properties were acquired. Therefore, the proposition that the Plaintiffs are not entitled to sue for the partition of

their share in the suit property during the life time of Vilasrao (D1), their father, cannot be imported with equal force to the facts of the case at hand.

26. Whether the Plaintiffs succeed in establishing that the suit properties were acquired while the Plaintiffs and the Defendants jointly carried on the family business is a matter for trial. However, the Plaintiffs cannot be non-suited, at the threshold, on the premise that they are not entitled to institute the Suit during the lifetime of Vilasrao (D1) and can only claim share in the property which would be allotted to Vilasrao (D1) in a partition; actual or constructive.

27. The tenor of the Suit is that the suit properties have been acquired in the names of the Plaintiffs and the Defendants from the income generated out of the joint family businesses. This nature of the Suit claim, makes a significant difference in the matter of the application of law. Had the Plaintiffs approached the Court with a case that one or more of the suit properties were the ancestral properties, different considerations would have come into play and the decision in the case of **Vasant Ramchandra Alias Chander Yelvande (Supra)** might have advanced the cause of the submission on behalf of the Defendants-Applicants.

28. To put in other words, as the nature of the Suit claim appears to be such that where a joint owner alleges acts of waste, mismanagement and damage to the jointly acquired property, by another joint owner, and seeks

partition and separate possession, the Plaintiffs cannot be non-suited without trial.

29. I am, therefore, not inclined to interfere with the impugned order in exercise of revisional jurisdiction.

30. Hence the following order:

: ORDER :

- (i) Civil Revision Application stands rejected.
- (ii) No costs.

[N. J. JAMADAR, J.]