

(2018) 07 BOM CK 0117

In the Bombay High Court

Case No : Second Appeal No.737, 738 Of 2013 With Civil Application No.1729 Of 2013

Balkrishna Pandurang Halde And Others

APPELLANT

Vs

Yeshodabai Balkrishna Halde And Other

RESPONDENT

Date of Decision : 30-07-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 39F, 300A
Hindu Succession Act, 1956 — Section 4, 5(i), 6, 8, 11, 16(i), 19, 23, 30
Hindu Marriage Act, 1955 — Section 12, 12(1), (2), 16, 16(1), 16(3)

Citation : (2018) 07 BOM CK 0117

Hon'ble Judges : DR. SHALINI PHANSALKAR-JOSHI, J

Bench : Single Bench

Advocate : Tejas Dande, Sachin Gite, Suresh M. Sabrad

Final Decision : Disposed Off

Judgement

1. Heard learned counsel for Appellants and Respondents finally, at the stage of admission itself.
2. Admit.
3. Both these Second Appeals are preferred by the unsuccessful Defendants against the 'Common Judgment and Decree' dated 4th September 2013 passed by District Judge-1, Niphad, District Nashik, in Regular Civil Appeal No.177 of 2005 and Regular Civil Appeal No.206 of 2005.
4. These two Appeals were directed against the 'Judgment and Decree' dated 2nd December 2002 passed by the Civil Judge, Senior Division, Niphad, District Nashik, in Special Civil Suit No.65 of 1995.
5. The said Suit was filed by Respondent Nos.1 to 3 herein for partition and separate possession of their 1/4th share each in the suit properties.

Respondent No.1 is the legally wedded wife of Appellant No.1 and Respondent Nos.2 and 3 are their married daughters. Appellant No.2 is the second

wife of Appellant No.1 and Appellant Nos.3 and 4 are the children born to Appellant No.2 from Appellant No.1 within the wedlock.

6. It is the case of the Respondents that, the suit lands bearing Gat Nos.185, 186, 88/2 and 89/1, situate at Mouje Datyane, Taluka Niphad, and the

house property bearing G.P. No.110-B, situate at Village Oney, Taluka Niphad, District Nashik, along with the other movable properties, like Jeep, six

Shares of Niphad Sugar Factory and the ornaments worth Rs.60,000/-, were the ancestral joint family properties of Appellant No.1. The marriage of

Respondent No.1 with Appellant No.1 took place on 27th February 1975. She co-habited with him for a period of about eight years and from within

the wedlock, Respondent Nos.2 and 3 are born. Thereafter, she was driven out of the house on 11th June 1983. Since then, she was residing along

with Respondent Nos.2 and 3 in the house of her brother. In a Suit filed by her for maintenance, bearing Regular Civil Suit No.268 of 1992, the land

bearing Gat No.88/2 was given to her towards her maintenance as her exclusive property and since then, she is in possession thereof. The said land

being given to her towards the maintenance, she has become absolute owner thereof and hence, it cannot be subjected to partition. However, as

regards the remaining three lands, the house property and other movable assets, she, along with her two daughters, is having 1/4th share each therein.

Appellant No.1, however, in order to deprive Respondent No.1 and her two daughters from their share in the joint family properties, had, out of the

income from the joint family properties, purchased Gat No.89/1 in the name of his second wife, i.e. Appellant No.2, and was also in the process of

transferring the lands bearing Gat Nos.185 and 186 in the name of Appellant Nos.3 and 4, who are the sons born to him out of the second marriage.

The Respondents were, therefore, constrained to file this Suit for partition and separate possession of their share in all these properties.

7. This Suit came to be resisted by the Appellants herein, denying that the land bearing Gat No.88/2 has become absolute property of Respondent

No.1. It was also denied that, the land bearing Gat No.89/1 was purchased by him in the name of Appellant No.2 out of the income from the ancestral

joint family properties. It was submitted that, the said land belongs exclusively to Appellant No.2. Hence, Respondents cannot claim any share in the

said property. Moreover, he has also transferred the lands bearing Gat Nos.185 and 186 in the name of his sons from the second wife. Therefore, the

Respondents cannot claim any share in the suit lands or other ancestral joint family properties.

8. The Trial Court was, after appreciating the evidence on record, pleased to hold that, as regards the land bearing Gat No.88/2, as it was given to

Respondent No.1 in view of the 'Decree' passed in Regular Civil Suit No.268 of 1992, she is the absolute owner thereof. Similarly, as regards the land

bearing Gat No.89/1, the Trial Court found, on the basis of the evidence adduced by Appellant No.2 that, she has purchased the same from the funds

given to her by her father. Hence, the Trial Court held that, the Respondents cannot be entitled to get share in the said land, as it belongs exclusively to

Appellant No.2. However, as regards the remaining two lands bearing Gat Nos.185 and 186, the Trial Court held the Respondents entitled to get their

share from the partition of the said lands and also in the movable properties, like the Jeep and six Shares of Niphad Sugar Factory. As regards the

house property bearing G.P. No.110-B, the Trial Court found that, Respondent Nos.2 and 3 being the married daughters, they cannot seek partition in

the dwelling house, in view of Section 23 of the Hindu Succession Act, 1956, and hence, the Trial Court has rejected their claim for share in the said

house.

9. As to the share of Respondents, the Trial Court held that, Appellant Nos.3 and 4 also being the legitimate sons of Appellant Nos.1 and 2, they are

having equal right in the said property. Accordingly, the Trial Court held Respondent Nos.1 to 3 entitled to the extent of $\frac{1}{2}$ share in the joint family

properties, bearing Gat Nos.185 and 186 and the Jeep and six Shares of Niphad Sugar Factory and Appellant Nos.1, 3 and 4 were also held entitled to

the $\frac{1}{6}$ th share each in the said property.

10. Both the Appellants and Respondents have challenged this Judgment of the Trial Court by preferring counter Appeals before the District Court.

Regular Civil Appeal No.177 of 2005 was preferred by the Respondents herein, claiming $\frac{1}{3}$ rd share each in all the joint family properties, including

the dwelling house and also the land bearing Gat No.89/1; whereas, Regular Civil Appeal No.206 of 2005 came to be preferred by the present

Appellants, being aggrieved by the partial decree of the Suit.

11. The first Appellate Court has, vide its impugned 'Common Judgment and Decree', dismissed the Appeal preferred by the Appellants; however,

allowed the Appeal preferred by the Respondents and granted Respondents the share in all the immovable properties, including the land bearing Gat

No.89/1 and also the dwelling house, but rejected their claim for partition in movable properties like Jeep and shares in Niphad Sugar Factory. The first

Appellate Court has also modified the share of the Respondents to the extent of 1/4th share each in all these properties.

12. Being aggrieved thereby, the Appellants have preferred these two separate Second Appeals. In addition to the grounds, which are raised in the

Appeal Memos, learned counsel for the Appellants has raised the following substantial questions of law, on which both the Second Appeals are

admitted and heard at the stage of admission itself.

(i) Whether the suit properties, described in Para 1A (i and ii), can be categorised as ancestral properties, particularly in view of the fact that the said

suit properties were devolved upon the Appellant/Original Defendant No.1, as per Section 8 of Hindu Succession Act, 1956 and particularly in view of

the ratio laid down in Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, (1986) 3 SCC 567 that such property devolved

as Joint Family Property, as per Section 8 of the Hindu Succession Act, 1956, would cease to be the Joint Family Property?

(ii) Whether the Plaintiffs, who are wife and daughters of Defendant No.1, can maintain a Suit for partition against him, claiming their respective

shares by division of alleged Joint Family Property, which is received by the Defendant under Section 8 of the Hindu Succession Act, 1956,

particularly in view of the ratio laid down in Uttam Vs. Saubhag Singh and Ors., (2016) 4 SCC 68 ?

(iii) Whether both the lower Courts have erred on the point of entitlement of children born out of void marriages for the purpose of succession of

properties under Section 16 of the Hindu Marriage Act, 1955, particularly in view of the ratio laid down in Parayankandiyal Eravath Kanapraavan

Kalliani Amma (Smt.) and Others Vs. K. Devi and Ors., (1996) 4 SCC 76 ?

13. The factual matrix of the present case is not in the realm of dispute. It is admitted that, Respondent No.1 is the legally wedded wife of Appellant

No.1 and Respondent Nos.2 and 3 are their married daughters. It is also

undisputed that, Appellant No.2 is the second wife of Appellant No.1, whose marriage was performed during subsistence of the marriage of Appellant No.1 with Respondent No.1 and, therefore, their marriage as such is void in view of Sections 5(i) and 11 of the Hindu Succession Act, 1956. In that sense, therefore, Appellant Nos.3 and 4, who are born to Appellant No.2, are born out of the void marriage and, therefore illegitimate sons, who are now conferred the status of legitimacy, in the light of Section 16(i) of the Hindu Succession Act, 1956.

14. In the backdrop of these admitted facts on record, as regards the factual aspects, it is the case of Respondent No.1 that, out of the ancestral joint family properties, as the land bearing Gat No.88/2 was given to her, as a result of the 'Decree' passed in Regular Civil Suit No.268 of 1992, she has become absolute and sole owner thereof. As observed by the first Appellate Court, there is nothing on record to show that the said Judgment is challenged by Appellant No.1 or it is reversed or set aside. Therefore, as the said land is allotted to Respondent No.1 by virtue of a 'Decree' passed in a judicial proceedings, both the Courts below have rightly held that, the said land is her absolute property and it cannot be the subject matter of partition.

15. As regards the land bearing Gat No.89/1, though it is the case of Appellant No.2 that, she has purchased the same out of the funds given to her by her father and hence the Trial Court has held that it is her absolute property, the first Appellate Court has rightly considered the admissions given by Appellant No.2 and also by Appellant No.1 that, when she had purchased the said land, she was not having any independent source of income. Except for her bare and interested words, she has also not produced any evidence on record about such funds being given by her father. She has also not examined her father to that effect, nor produced any documentary evidence, like the Cheque, PassBook, Bank Statement or recitals in the 'Sale-Deed'. There are no pleadings to that effect. In the written statement also, Appellant No.2 has not stated from which source, she has raised those funds for purchase of the said land. For the first time, Appellant No.2 has put up this case in the course of her evidence. Hence, in the absence of any pleadings on record to that effect, the first Appellate Court has rightly disbelieved the same and held that, as the said land is purchased by Appellant

No.1 in the name of Appellant No.2 from the income of the joint family properties, it is also subject matter of partition.

16. In respect of the lands bearing Gat Nos.185 and 186, admittedly, these are the ancestral joint family properties, which were inherited by Appellant

No.1 and which fact he has categorically admitted in the application at 'Exhibit-92', which was given to the Tahasildar for entering the names of

Appellant Nos.3 and 4 to the said property. In his cross-examination also, Appellant No.1 has admitted the fact that he has received these properties

in the partition. Therefore, it has to be held that, both the Trial Court and the first Appellate Court had rightly held the Respondents entitled for their

share in these properties. As to the house property, in view of deletion of Section 23 of the Hindu Succession Act, by way of Amendment Act of

2005, the Appellate Court has rightly held Respondent Nos.2 and 3 entitled for partition of their share in the said house also.

17. The submission of learned counsel for the Appellants is, however, to the effect that, even though both these lands bearing Gat Nos.185 and 186

might be initially the ancestral joint family properties, but when Appellant No.1 received the same by way of succession from his father, they ceased

to be the joint family properties and they became his individual properties. Therefore, according to him, both the Courts below have committed an error

in holding these lands as the ancestral joint family properties, in which the Respondents were held entitled to the share.

18. To substantiate this submission, learned counsel for the Appellants has relied upon the two Judgments of the Hon'ble Apex Court; the first pertains

to the Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, (1986) 3 SCC 567. In this case, the issue raised for

consideration pertains to the applicability of the Wealth Tax and Income Tax to the income or assets inherited by a son from his father on his

separation. The question raised before the Apex Court was, 'whether such property can be assessed as his income as 'Karta' of his Hindu Undivided

Family or in his individual capacity?' In that context, in paragraph No.10 of the said Judgment, it was held as follows :-

â??10. The question here, is, whether the income or asset, which a son inherits from his father, when separated by partition, the same should be

assessed as income of the Hindu Undivided Family of son or his individual income. There is no dispute among the commentators on Hindu Law, nor in

the decisions of the Court that, under the Hindu Law as it is, the son would inherit the same as 'Karta' of his own family. But the question is, what is

the effect of Section 8 of the Hindu Succession Act, 1956? The Hindu Succession Act, 1956 lays down the general rules of succession in the case of

males. The first rule is that, the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the

Schedule provides that, if there is a male heir of Class I, then, upon the heirs mentioned in Class I of the Schedule. Class I of the Schedule reads as

follows :-

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased

daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow

of a predeceased son of a predeceased son.

11. The heirs mentioned in Class I of the Schedule are son, daughter etc., including the son of a predeceased son, but does not include specifically the

grand-son, being a son of a son living. Therefore, the short question is, when the son as heir of Class I of the Schedule inherits the property, does he

do so in his individual capacity or does he do so as 'Karta' of his own undivided family?â??

19. While deciding this question, in paragraph No.22 of the said Judgment, it was held by the Hon'ble Apex Court that, â??22. In view of the preamble

to the Act i.e. to modify where necessary and to codify the law, in our opinion, it is not possible when Schedule indicates heirs in Class I and only

includes son and does not include son's son, but does include son of a predeceased son, to say that, when son inherits the property in the situation

contemplated by Section 8, he takes it as 'Karta' of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean

that, though the son of a predeceased son and not the son of a son, who is intended to be excluded under Section 8 to inherit, the latter would be

applying the old Hindu Law get a right by birth of the said property, contrary to the Scheme outlined in Section 8. Furthermore, as noted by the Andhra

Pradesh High Court that, the Act makes it clear by Section 4 that, one should look to the Act in case of doubt and not to the pre-existing Hindu Law.

It would be difficult to hold today the property, which devolved on a Hindu, under

Section 8 of the Hindu Succession Act, would be HUF in his hand

vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs, in whose hands it will be joint

Hindu family property, and visa-vis son and female heirs, with respect to whom no such concept could be applied or contemplated. It may be

mentioned that, heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.â? [Emphasis

Supplied]

20. Thus, even a cursory glance to this Judgment of the Hon'ble Apex Court is more than sufficient to show that the facts of the said case were totally

different. In that case, the question raised for consideration was, 'whether the income or assets, which a son inherits from his father, when separated

by partition, the same should be assessed as income of the Hindu Undivided Family of son or his individual income ?' In that context, while considering

the effect of Section 8 of the Hindu Succession Act, 1956, it was held that, as the son, daughter etc., including the son of a predeceased son, are

included in Class-I heir, but the grand-son, being a son of a son living, is not included in Class-I heir, when he inherits the property, he does so in his

individual capacity and not as 'Karta' of Hindu Undivided Family.

21. Needless to state that, this Judgment of the Hon'ble Apex Court, in the context of the facts in which it was given, thus, cannot become in any way

applicable to the facts of the present case. Here there is no question of Appellant No.1 constituting any HUF business with his father while his father

was alive and there was any partition of such business. Hence, the said case is distinguishable on facts. Here in the case, the status or character of

the properties inherited by Appellant No.1 remains the same as ancestral joint family properties and it cannot be accepted that, these properties

ceased to be joint family properties in his hands and they became his individual properties.

22. Learned counsel for the Appellants has then placed reliance on the Judgment of the Hon'ble Apex Court in the case of Uttam Vs. Saubhag Singh

and Others, (2016) 4 SCC 68. However, the facts of the said case are also totally different from the facts of the present case. In that case, one

â??Jâ?, having interest in the ancestral Mitakshara joint family property, along with other coparceners, died in 1973, leaving behind his widow

and sons. The Appellant-Plaintiff was the grandson of J, who was born in 1977 i.e. after his grand-father's death. He filed a Suit for

partition of the joint family property in 1998, in which the first four Defendants were his father (Defendant No.3) and his father's three brothers

(Defendant Nos.1, 2 and 4). He claimed a 1/8th share in the suit property on the footing that, the suit property was ancestral property and that being a

coparcener, he had a right by birth in the said property in accordance with the Mitakshara Law.

23. The Trial Court, in the year 2000, decreed the Suit holding that, the property was ancestral and that on the evidence, there was no earlier partition

of the property, as pleaded by the Defendants in their written statement. The first Appellate Court, while confirming the Trial Court's findings

regarding the property being ancestral and there being no earlier partition, held that, after death of the Plaintiff's grand-father J, his widow being

alive, J's share would have to be distributed in accordance with Section 8 of the Hindu Succession Act, 1956, as if J had died intestate

and as such, the joint family property had to be divided in accordance with rules of intestacy and not survivorship. Accordingly, no joint family property

remained to be divided, when the Suit for partition was filed by the Plaintiff and that since the Plaintiff had no right while his father was alive, the

father alone being a Class-I heir and consequently the Plaintiff not being a Class-I heir, the Plaintiff had no right to sue for partition and, therefore, the

Suit was dismissed. Consequently, the First Appeal was allowed. The High Court dismissed the Second Appeal of the Plaintiff following the same line

of reasoning and the Hon'ble Apex Court also dismissed the Second Appeal by Special Leave. While deciding this factual controversy, the Hon'ble

Supreme Court has summarized the law insofar as it applies to succession to the joint family property governed by the Mitakshara School, prior to the

Amendment of 2005, as follows :-

18.

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara

coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the

Act, making it clear that notwithstanding anything contained in the

Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that, if such a male Hindu had died leaving

behind a female relative, specified in Class I of the Schedule, or a male relative, specified in that class, who claims through such female relative

surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener, who is governed by Section 6 Proviso, a partition is effected by operation of law

immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu, leaving self-acquired property or by the application of

Section 6 Proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles

of intestacy, the joint family property ceases to be joint family property in the hands of the various persons, who have succeeded to it, as they hold the property as tenants-in-common and not as joint tenants.â??

24. Applying the law laid down above to the facts of the case, it was held in paragraph No.19 of the said Judgment that, "On the death of

Jagannath Singh in 1973, the joint family property, which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved

by succession, under Section 8 of the Hindu Succession Act, 1956. This being the case, the ancestral property ceased to be joint family property on

the date of death of Jagannath Singh and the other coparceners and his widow held the property as tenants-in-common and not as joint tenants. This

being the case, on the date of the birth of the Appellant in 1977, the said ancestral property, not being joint family property, the Suit for partition of

such property would not be maintainable.â??

25. Thus, it can clearly be discerned that the facts of the said case were different in the sense that, the Suit for partition was filed by the son against his father and three brothers, when they were in joint family with their father, and in that context, it was held that, these four brothers and father were holding the property as tenants-in-common and not joint tenants. Therefore, the grand-son cannot maintain Suit for partition, claiming his share by division of the alleged joint family property.

26. Here in the case, it is not at all the contention of Appellant No.1 that, still he continues to be in joint family with his father or brother. Admittedly, the properties inherited by him are the ancestral joint family properties and hence, Respondent Nos.1 to 3, namely, his legally wedded wife and two daughters from the first wife, are entitled to seek partition in the suit properties. It cannot be said that the suit properties have ceased to be joint family properties. The legal position, which is discussed in the above-said Judgment of Uttam Vs. Saubhag Singh (Supra), on which much reliance is placed by learned counsel for the Appellants, therefore, cannot be made applicable to the facts of the present case.

27. The reliance placed by learned counsel for the Appellants on the Judgment of the Hon'ble Apex Court in the case of Parayankandiyal Eravath

Kanapravan Kalliani Amma (Smt.) and Others Vs. K. Devi and Others, (1996) 4 SCC 76, is also totally misplaced. It cannot be made applicable to

the present case, as the question involved in the said Judgment was, 'the legitimacy of the children born out of the void marriage, prior to

commencement of the Hindu Marriage Act, 1955', and in that context, it was held that, pre-amended Section 16, classifying legitimate children into

two groups, namely, those born of void marriages performed before the Act and those born of void marriages performed after the Act came into

force, was violative of Article 14. Hence, the amendment removing this mischief and also de-linking Section 11 from Section 16 was the correct one.

Here in the case, no question is involved as to whether Appellant Nos.3 and 4 are born before amendment of Section 16 in the Hindu Marriage Act,

1955. Therefore, this Judgment is of no use.

28. Once it is held that the suit properties are ancestral joint family properties, it follows that, in view of amendment to Section 6 of the Hindu

Succession Act, 1956, Respondent Nos.2 and 3 being the daughters and hence

equal coparceners like sons, are entitled to claim partition and equal share like that of a son in the joint family properties of their father-Appellant No.1. In the said partition, Respondent No.1, being a legally wedded wife, is also entitled to equal share like Respondent Nos.2 and 3.

29. This brings me to the question as to the share and the entitlement of Appellant Nos.2 to 4 in the suit properties. As regards Appellant No.2, admittedly, her marriage with Appellant No.1 having taken place during subsistence of the marriage of Appellant No.1 with Respondent No.1, her marriage is void and hence, she cannot be entitled to any share in the joint family properties; even in the properties, which might be allotted to the share of Appellant No.1 in the notional partition. As regards Appellant Nos.3 and 4, they are the sons born to Appellant No.2 within the wedlock, but as they are the children born of a void wedlock, their rights are required to be considered in the light of Section 16 of the Hindu Marriage Act, 1955, which can be reproduced for ready reference as follows :-

â??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.â?? [Emphasis Supplied]

30. Thus, as per the legal position, as spelt out in Section 16(1) of the Act, the legitimacy is definitely conferred on the children born out of a void

marriage. Therefore, in this case, Appellant Nos.3 and 4 can definitely be called as legitimate children. However, the real question for consideration is,

'what effect it has so far as the right of such children to get share in the property of their parents; whether the property of their parents include only

their self-acquired property or also the joint family property?' In this respect, sub-section (3) of Section 16 of the Hindu Marriage Act, 1955, makes the

position very clear by stating that, such children can have right only in the property of their parents and not in the property of any other person. As to

the question, 'whether the property of their parents, therefore, include the property, which is self-acquired by the parents, or, which is in the hands of

their parents as joint family property?', the Division Bench of this Court has, in the case of Shantaram Tukaram Patil Vs. Smt. Dagubai Tukaram Patil,

1987 (1) Bom.C.R. 714, after taking review of all its earlier decisions, was pleased to hold, in paragraph No.18 of its Judgment that, â??In our opinion,

therefore, it will be incorrect to say that, the son of a void marriage, though legitimate by virtue of the provisions contained in Section 16 of the Hindu

Marriage Act, can claim a share in the property, which belongs to a coparcenary, of which his father is a Member.â??

31. In paragraph No.24 of the said Judgment, it was further held that, â??Since no child acquires a right in the property of its parents by birth, these

rights can be exercised only by way of succession to the property. For that purpose, such children are to be treated as heirs in Class-I of the Schedule

to the Hindu Succession Act and they are entitled to succeed in accordance with the provisions contained in Section 8 of the Hindu Succession Act.â?

32. In paragraph No.27 of the said Judgment with regard to the child of a void marriage, it was held that, â??Such a child does not acquire right to

property, which a legitimate child would, but the legitimacy confers upon him the right to property of his parents alone. The property, to which such a

child can lay claim, must be the separate property of the parents and not the coparcenary property, in which the parent has a share.â??

33. Thus, it is now made more than clear that, the children of a void marriage, though regarded as legitimate, such children would not be entitled to any

share in the properties, which are ancestral coparcenary joint family properties of their parents. Their right to claim the share remains limited only to

the extent of the separate property of their father, but in that property, they cannot make any claim during the lifetime of their father. Their right in the

separate properties of their father will accrue only on the death of their father and, that too, by way of succession.

34. The Hon'ble Apex Court has, in the case of *Jinia Keotin Vs. Kumar Sitaram Manjhi*, (2003) 1 SCC 730, made this legal position further clear, after

considering the provisions of Section 16(3) of the Hindu Marriage Act, 1955, as follows :-

4. “We have carefully considered the submissions of the learned counsel on either side. The Hindu Marriage Act underwent important changes by

virtue of the Marriage Laws (Amendment) Act, 1976, which came into force with effect from 27th May 1976. Under the ordinary law, a child for

being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any

child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of

the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects

on society, came to be put an end to by the mandate of Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children,

which depended very much upon the marriage between their parents being valid or void, thus, turned on the act of the parents, over which the

innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by

being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 is to put an end to a great social evil. At the

same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate,

notwithstanding that the marriage was void or voidable, chose also to confine its application, so far as succession or inheritance by such children is

concerned, to the properties of the parents only.” [Emphasis Supplied]

5. “So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate,

at the same time, it expressly provides in sub-section (3) by engrafting a provision with a non obstante clause, stipulating specifically that nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents. In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act, but also would amount to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.

35. Thus, the Hon'ble Supreme Court has found that, the express mandate laid down by Legislature in Section 16(3) of the Act cannot be ignored, by resorting to any presumptive or inferential process of reasoning to confer any further rights on such children in the joint family property. Thus, the legal position, which stands as on today is that, though by virtue of Section 16(1) of the Hindu Marriage Act, the illegitimate child has been conferred the status of a legitimate child, it did not confer the status of a coparcener. Consequently, such a child does not acquire any right by birth in any property, much less coparcenery or joint family property. As illegitimate child is not a coparcener, he can exercise his right in father's property only on his father dying intestate. He has no right by birth and hence, he cannot be given any share even in the property of his parents till they are alive.

36. The latest, though not the last, pronouncement of the Hon'ble Apex Court on this subject is of *Revanasiddappa Vs. Mallikarjun*, (2011) 11 SCC 1, wherein the Apex Court has again considered the interpretation of Section 16(3) of the Hindu Marriage Act, 1955, and after taking the review of its earlier decisions held that, the view taken in *Jinia Keotin* (Supra) was a narrow view of Section 16(3) and, therefore, has placed the matter before the

Larger Bench for re- consideration of that view, in the light of the Constitutional provisions of Article 300-A and Article 39-F, which deal with the

'Concept of Property Rights'. The said 'Reference' is yet to be decided. As a result, the legal position, which stands as on today, is that, the children

born to the second wife, who are rightfully called as 'legitimate', their right to get share in the property is, however, restricted only to the property of

their parents and not to the joint family properties.

37. Here in the case, admittedly, all the suit properties are the ancestral joint family properties of Appellant No.1. As stated above, in the application

given to the Tahasildar vide 'Exhibit-92', Appellant No.1 has categorically stated that, these are the ancestral joint family properties and, therefore,

Appellant Nos.3 and 4, who are born out of the void marriage, cannot get any share therein at par with the share of Respondent Nos.2 and 3, who are

the daughters born from the first marriage and, therefore, in the strict sense, legitimate children.

Appellant Nos.3 and 4 can get share only in the properties, which Appellant No.1 would get to his share.

38. The first Appellate Court has, therefore, rightly held that, Respondent Nos.1 to 3 will get 1/4th share each in the suit lands bearing Gat Nos.185,

186, 89/1 and house property bearing G.P. No.110-B. Appellant No.1 will, accordingly, get 1/4th share.

39. As regards the share of Appellant Nos.3 and 4, they will get only by way of succession, in the 1/4th share of Appellant No.1 on his dying intestate.

So far as the present Suit is concerned, they cannot be entitled to any share in the suit properties.

40. The impugned 'Common Judgment and Decree', therefore, passed by the first Appellate Court being just, legal and correct and in tune with the

legal position discussed above, no interference is warranted therein. Both the Second Appeals, therefore, stand dismissed.

41. In view of dismissal of both these Second Appeals, Civil Application No.1729 of 2013, pending in Second Appeal No.737 of 2013, does not survive

and the same stands disposed off as infructuous.