

4 . RAJARAM S/O NAYAKU NIKAM,
AGE 35 YEARS, OCC AGRICULTURE

5 . BABITA W/O RAMACHANDRA BHOSLE,
AGE 33 YEARS, OCC HOUSEWIFE,

6 . DEEPALI W/O MOHAN PATIL,

.. APPELLANTS

(BY SMT. BHARATHI G. BHAT, ADV. FOR APPELLANT NO.1(A) AND
APPELLANT NOS.2 TO 6.

APPELLANT NO.1(B) MINOR AND REP. BY APPELLANT NO.1(A))

AND:

1 . BHARATI W/O TANAJI NIKAM,

2 . KUMARI. VARSHA D/O TANAJI NIKAM,

.. RESPONDENTS

(BY SRI. SANGRAM S. KULKARNI, ADV. FOR R1.
R2 IS MINOR REPRESENTED BY R1.)

THIS RFA IS FILED UNDER SEC.96 R/W. ORDER 41 RULE 1 OF CPC 1908 AGAINST THE JUDGMENT AND DECREE DATED:09.10.2015 PASSED IN O.S.NO.91/2013, ON THE FILE OF SENIOR CIVIL JUDGE AND JUDICIAL MAGISTRATE FIRST CLASS, RAIBAG, DECREERING THE SUIT FILED FOR PARTITION AND SEPARATE POSSESSION.

THIS APPEAL COMING ON FOR FINAL HEARING, THIS DAY, **RAJENDRA BADAMIKAR, J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the defendants against the judgment and decree dated 09.10.2015 passed by the learned Senior Civil Judge and JMFC, Raibag, in O.S.No.91/2013, whereby the learned Senior Civil Judge has decreed the suit filed by the plaintiffs by awarding them $1/3^{\text{rd}}$ share each in the $1/6^{\text{th}}$ share of first defendant in the suit schedule properties.

2. For the sake of convenience, the parties herein are referred with the original ranking occupied by them before the trial Court.

3. The plaintiffs have filed a suit for partition and separate possession of their $1/18^{\text{th}}$ share in the suit schedule properties. Plaintiff No.1 claims to be the wife

and plaintiff No.2 claims to be the daughter of defendant No.1. The propositus of the family is said to be one Nayaku and he left defendant Nos.1 to 6 as his legal heirs. The plaintiffs are the wife and daughter of defendant No.1. It is alleged that defendant No.1 has neglected and trying to alienate suit property as he contracted second marriage illegally and hence they filed a suit for partition and separate possession seeking their 1/3rd share in the 1/6th share of defendant No.1.

4. Defendant No.1 filed his written statement which is adopted by the other defendants and the relationship between the parties is admitted. It is asserted that, at the instance of one Yashwant Maruti Chavan, plaintiff No.1 has filed a suit and also filed a petition for maintenance and the plaintiffs are residing separately. It is alleged that, plaintiff No.1 deserted defendant No.1 and she is living in adulterous life. It is also alleged that the plaintiffs have not impleaded necessary parties and they are no way concerned to the family properties of defendant No.1 and as such, sought for dismissal of the suit.

5. On the basis of these pleadings, the trial Court has framed the following issues:

" 1. Whether the plaintiffs prove that, the suit schedule properties are the ancestral joint family properties?

2. Whether the suit is bad for non-joinder of necessary parties?

3. Whether the plaintiffs are entitled to their legitimate share and separate possession in the suit properties?

4. What order or decree?"

6. Plaintiff No.1 is examined as PW-1 and one witness was examined as PW-2. The plaintiffs have also placed reliance on 7 documents marked at Exs.P-1 to P-7. Defendant No.1 was examined as DW-1 and one witness was examined on behalf of the defendants as DW-2. The defendants have also placed reliance on 8 documents marked at Exs.D-1 to D-8.

7. The trial Court, after hearing the arguments advanced by both the parties and after appreciating the oral and documentary evidence, answered issue Nos.1 and 3 in the affirmative while issue No.2 is answered in the negative and thereby decreed the suit of the plaintiffs by

awarding each plaintiff 1/3rd share out of 1/6th share of defendant No.1. Being aggrieved by this judgment and decree, defendants have filed this appeal.

8. During the pendency of the appeal, appellant No.1/defendant No.1 died and it is alleged that appellant No.1(a) and 1(b), being the 2nd wife and the child born out the second wife, are his legal representatives and sought for bringing them on record as legal representatives of deceased defendant No.1. The said application came to be allowed by order dated 10.09.2020 reserving the rights to decide the legality of their heirship during the final hearing.

9. The appellants have also filed I.A.1/2020 under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter for brevity referred to as 'CPC') for production of School ID card, Aadhar card, Bank pass book, certified copies of the sale deeds in favour of appellant Nos.2 to 4, birth certificate of appellant No.1(b) etc to prove that certain properties are self acquired properties of appellant Nos.2 to 4.

10. Heard the arguments advanced by the learned counsel for the appellants/defendants and the learned counsel for the respondents/plaintiffs. We have also perused the records of the trial Court in detail.

11. Now, in view of these, learned counsel for the appellants would contend that certain properties are self acquired properties of appellant Nos.2 to 4/defendant Nos.2 to 4 and appellant No.1(b) is the legal heir of deceased defendant No.1. Hence, she would contend that all the properties are held to be ancestral joint family properties and the said finding is erroneous. As such, it is prayed for allowing the appeal as well as I.A.1/2020 by setting aside the impugned judgment and decree.

12. *Per contra*, learned counsel for the respondents would support the impugned judgment of the trial Court. However, he does not dispute the fact that defendant No.1 contracted second marriage with appellant No.1(a) during subsistence of marriage between plaintiff No.1 and defendant No.1. He would contend that, the share, if any, that is going to be allotted to appellant No.1(b) is only in

the share of defendant No.1 and nothing more. He would further contend that the sale deeds now sought to be produced have no relevancy since there is no pleading before the trial Court regarding self acquisition of the property. As such, he has sought for dismissal of the appeal as well as I.A.1/2020.

13. Having heard the arguments and perusing the records of the trial Court, the following points would arise for our consideration:

- i. Whether the judgment and decree of the trial Court is erroneous, perverse or arbitrary so as to call for any interference by this Court?*
- ii. Whether I.A.1/2020 needs to be allowed?*
- iii. Whether the appellant No.1(a) gets a status of 'legally wedded wife', as claimed by her?*

14. It is an admitted fact that, plaintiff No.1 is the legally wedded wife of defendant No.1 and out of the said wedlock, plaintiff No.2 is born. The plaintiffs are claiming share in the share of defendant No.1. According to the plaintiffs, all the suit schedule properties are joint family

properties. Now by filing I.A.1/2020 under Order XLI Rule 27 of CPC, the defendants/appellants are attempting to make out a case that, some of the suit schedule properties are purchased by defendant Nos.2 to 4 and they are their self acquired properties. However, on perusal of the written statement of the defendants, no such plea was raised before the trial Court. Further, there is no pleading that, apart from the joint family nucleus, the defendants had any independent nucleus so as to acquire any separate property in the name of the respective defendants. In the absence of specific pleadings, the documents which are now sought to be produced have no relevancy.

15. The status of the plaintiffs is admitted in the written statement itself. It is also an admitted fact that the joint family is having sufficient properties and it has got nucleus to acquire the properties. Under such circumstances, when there is no specific plea in the written statement, presumption is that, the properties acquired subsequently are with the aid of the joint family properties

and as such, they acquire the character of joint family itself. Hence, I.A.1/2020 does not survive for consideration.

16. Admittedly, appellant No.1, who was defendant No.1 before the trial Court, died during the pendency of this appeal. Appellant Nos.1(a) and 1(b) are sought to be brought on record and they were permitted to be brought on record by order dated 10.09.2020 subject to other legal rights under law.

17. Section 5 of the Hindu Marriage Act, 1955, lays down 'Conditions for a Hindu marriage' which reads thus:

" 5. Conditions for a Hindu marriage.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

- (i) neither party has a spouse living at the time of the marriage;*
- (ii) at the time of the marriage, neither party—*
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or*
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or*

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

Admittedly, plaintiff No.1 is the wife of defendant No.1 and their marriage is not dissolved. Section 11 of the Hindu Marriage Act deals with 'void marriages' and any marriage is solemnized in contravention of Section 5 of the Hindu Marriage Act, is a void marriage. Under such circumstances, the marriage between appellant No.1(a) and defendant No.1/appellant No.1 is hit by Section 11 read with Section 5(i) of the Hindu Marriage Act and it is a void marriage. As such, appellant No.1(a) does not get any status of legally wedded wife.

18. However, Section 16 of the Hindu Marriage Act deals with 'legitimacy of children born out of the void and voidable marriages' which reads thus:

“ 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.”

19. The plaintiffs have not disputed that appellant No.1(a) had married defendant No.1/appellant No.1 during subsistence of the marriage of plaintiff No.1 with deceased defendant No.1. As such, as per Section 16 of the Hindu Marriage Act, legitimacy is confirmed on appellant No.1(b) and he will get a share in the share of the father along with other legal heirs left by the deceased. Admittedly, the deceased defendant No.1 has left the plaintiffs as his legal heirs along with appellant No.1(b) alone. It is evident that defendant No.1 is having $1/6^{\text{th}}$ share in all the suit schedule properties. As rightly observed by the trial Court, each plaintiffs are entitled for $1/3^{\text{rd}}$ share in $1/6^{\text{th}}$ share of defendant No.1 and as such, the plaintiffs are entitled for $1/18^{\text{th}}$ share each in the suit schedule properties. Defendant No.1/appellant No.1 is entitled for $1/18^{\text{th}}$ share. His $1/18^{\text{th}}$ share devolves upon the plaintiffs and appellant No.1(b). As such, appellant No.1(b) will get $1/18^{\text{th}} \times 1/3^{\text{rd}}$ i.e. $1/54^{\text{th}}$ share while each plaintiffs will get $1/18^{\text{th}} + 1/54^{\text{th}}$

share and their share stands enhanced. The share of appellant Nos.2 to 6 remains as that of $1/6^{\text{th}}$ as awarded by the trial Court. As such, the trial Court has considered all these aspects in detail and appreciated the oral and documentary evidence in accordance with law and has arrived at a just conclusion by awarding the legitimate share to the plaintiffs. The judgment and decree of the trial Court does not suffer from any infirmity, illegality or perversity so as to call for any interference by this Court. However, in view of death of appellant No.1/defendant No.1, automatically, the share of plaintiffs stand enhanced by devolution of the share of defendant No.1/appellant No.1 since he died intestate during the pendency of this appeal.

20. Accordingly, the points under consideration are answered in the negative and the appeal needs to be allowed partly regarding modifying the share of the parties including that of the plaintiffs in view of death of defendant No.1/appellant No.1 during the pendency of this appeal.

Accordingly, we proceed to pass the following order:

The appeal is allowed in part. The judgment and decree dated 09.10.2015 passed by the learned Senior Civil Judge and JMFC, Raibag, in O.S.No.91/2013, is modified by awarding $1/18^{\text{th}}$ share + $1/54^{\text{th}}$ share to each plaintiffs and appellant No.1(b) is awarded $1/54^{\text{th}}$ share i.e. $1/3^{\text{rd}}$ share in $1/18^{\text{th}}$ share of defendant No.1/appellant No.1. The share of defendant Nos.2 to 6 remains unaltered. Consequently, I.A.1/2020 stands dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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