THE HIGH COURT OF ORISSA, CUTTACK

NO.XI-14/23/15326 Date 27/09/23

From

Shri S.K. Mishra
Registrar (Judicial)

To

The District & Sessions Judge,.....(all)

Sub: Judgement Dtd.01.09.2023 passed in Civil Appeal No.2844 of 2011 (Revanasiddappa & Anr. Vrs. Mallikarjun & Ors.) by the Hon'ble Supreme Court of India.

Sir,

I am directed to forward herewith a copy of the Judgement Dtd. 27.02.2023 passed in Civil Appeal No.2844 of 2011 (Revanasiddappa & Anr. Vrs. Mallikarjun & Ors.) by the Hon'ble Supreme Court of India for your information with a request to communicate the same to all the Judicial Officers working within your respective jurisdiction for their information and necessary action.

Yours faithfully,

27/9/2023

REGISTRAR (JUDICIAL)

Encl.- As above

ITEM NO.1501 COURT NO.1 SECTION IV-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).2844/2011

REVANASIDDAPPA & ANR. Appellant(s)

VERSUS

MALLIKARJUN & ORS. Respondent(s)

(WITH IA No. 176444/2019 - APPLICATION FOR SUBSTITUTION, IA No. 176447/2019 - CONDONATION OF DELAY IN FILING SUBSTITUTION APPLN., IA No. 176445/2019 - SETTING ASIDE AN ABATEMENT)

WITH
C.A. No. 7318/2014 (IV)

SLP(C) No. 81/2016 (IX)

SLP(C) No. 14176-14177/2016 (XII)

C.A. No. 2312/2021 (III)

C.A. No. 4398/2019 (III)

SLP(C) No. 27834/2017 (IX)
(WITH IA No.56102/2017-CONDONATION OF DELAY IN REFILING and and IA No.56101/2017-CONDONATION OF DELAY IN FILING and IA No.56103/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

SLP(C) No. 23397-23398/2018 (IX)

SLP(C) No. 1573-1574/2021 (IV-A)
(FOR ADMISSION)

Date : 01-09-2023 **These matters were called on for pronouncement of judgment today.**

For Appellant(s) **Ms. Kiran Suri, Sr. Adv.**
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Ms. Aishwarya Kumar, Adv.
Ms. Vidushi Garg, Adv.
Mr. Purvesh Buttan, Adv.
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Mr. TSR Venkataramana, Sr. Adv.
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Mr. Abhay Singh, Adv.
Mr. Ramesh Singh Thakur, Adv.

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Ms. Manju Jetley, AOR

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Mr. Shivang Singh, Adv.
Mr. Aditya Yadav, Adv.
Ms. Palak Mathur, Adv.
Mr. Varun Solshe, Adv.

Mr. Satyajit A. Desai, Adv.
Mr. Siddharth Gautam, Adv.
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Mr. Gajanan N. Tirthkar, Adv.
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Vatsalya Vigya, Adv.
Mr. Sdhakul R. Ghatole, Adv.
Mr. Mahesh P. Shinde, Adv.
Ms. Rucha A. Pande, Adv.
Mr. Aman Shreyas, Adv.
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Mr. Chandra Prakash, AOR

Mr. P.B. Suresh, Adv.
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Mr. S. Rajappa, AOR

Mr. Avinash B. Amarnath, AOR

Mr. Mukesh K. Giri, AOR

Mr. Nishant Ramakantrao Katneshwarkar, AOR

Mr. Samrat Krishnarao Shinde, AOR

Mr. Shirish K. Deshpande, AOR
Ms. Rucha Preavin Mandlik, Adv.
Ms. Harsimra Kaur Rai, Adv.
Mr. Sharangouda N. Patil, Adv.
Mr. Mohit Gautam, Adv.
Mr. Apoorv Sharma, Adv.
Mr. Harrish Ahmed, Adv.

Mr. Shanthakumar V Mahale, Adv.
Mr. Rajesh Mahale, AOR

Ms. Jyotika Kalra, AOR
Mr. Aditya Jha, Adv.
Ms. Annvesh Deb, Adv.

Mr. Lakshmi Raman Singh, AOR

Mr. H. Chandra Sekhar, AOR

Mr. Sriram P., AOR

1 Hon’ble Dr Justice D Y Chandrachud, Chief Justice of India pronounced the judgment of the Bench comprising His Lordship, Hon’ble Mr Justice J B Pardiwala and Hon’ble Mr Justice Manoj Misra.

2 The reference is answered In terms of the signed reportable judgment.

3 The proceedings in the individual cases shall now be listed immediately before a two Judge Bench in accordance with the assignment of work for disposal.

4 A large number of cases are likely to have remained pending before each High Court due to the pendency of this reference to the three judge Bench. The Registrar (Judicial) of this court is directed to immediately circulate a copy of the Judgment to the Registrars (Judicial) of all the High Courts who shall upon taking suitable directions from the Chief Justices on the administrative side ensure that all pending cases involving the issues decided here are listed for hearing and disposal before the assigned benches according to the rosters of work.

(SANJAY KUMAR-I) **(SAROJ KUMARI GAUR)**
DEPUTY REGISTRAR **ASSISTANT REGISTRAR**
(Signed reportable judgment is placed on the file)

2023INSC783

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 2844 of 2011

Revanasiddappa & Anr. **…Appellants**

Versus

Mallikarjun & Ors. **…Respondents**

With
Civil Appeal No 2312 of 2021

With
SLP (C) Nos 23397-98 of 2018

With
Civil Appeal No 7318 of 2014

With

SLP (C) No 81 of 2016

With

Civil Appeal No 4398 of 2019

With

SLP (C) No. 14176-77 of 2016

With

SLP (C) No. 27834 of 2017

And with

SLP (C) No 1573-74 of 2021

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J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

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A. The reference to the three Judge Bench

1. A child born to parents whose marriage is *null* and *void* under Section 11 of the Hindu Marriage Act 1955[1] is declared to "be legitimate" by Section 16 (1) if a child "of such marriage... would have been legitimate if the marriage had been valid." Likewise, where a decree of nullity has been granted under Section 12 in respect of a voidable marriage, a child "begotten or conceived before the decree is made" is "deemed to be their legitimate child" if such a child would have been the legitimate child of the parties to the marriage if the marriage had been dissolved instead of being annulled[2]. Section 16(3) enunciates that a child of a marriage that is *null* or *void* or which is annulled by a decree of nullity shall not have "any rights in or to the property of any person, other than the parents" where but for the enactment of the legislation such a child would be incapable of possessing or acquiring any such rights "by reason of his not being the legitimate child of his parents".

2. Several decisions of this Court have considered the nature of the property rights conferred on children of parents whose marriage is either *void* or in respect of which a decree of nullity has been passed under Section 12. In **Jinia Keotin** v **Kumar Sitaram Manjhi**[3], a two judge Bench held that merely because the children born out of a *void* and *illegal* marriage have been specifically safeguarded under Section 16, they ought not to be treated on par with children born from a lawful

[1] The Hindu Marriage Act 1955 (HMA)
[2] Section 16(2) of HMA
[3] (2003) 1 SCC 730

marriage for the purpose of inheritance of the ancestral property of the parents[4]. This Court held that in view of the express mandate of the legislature in Section 16(3), a child born from a *void* marriage or a voidable marriage in respect of which a decree of nullity has been passed would have no right to inheritance in respect of ancestral or coparcenary property. The decision in **Jinia Keotin** was followed by two judge benches in **Neelamma** v **Sarojamma**[5] and later in **Bharatha Matha** v **R Vijaya Renganathan**[6]. After adverting to the two earlier decisions, this Court held that "a child born of *void* or *voidable* marriage is not entitled to claim inheritance in ancestral coparcenary property but is entitled only to claim a share in self-acquired properties."[7]

3. The correctness of the decisions in **Jinia Keotin, Neelamma,** and **Bharatha Matha** has been doubted by a two judge Bench in **Revanasiddappa** v **Mallikarjun**[8]. In its order referring the correctness of the earlier decisions to a larger bench, the Court has premised its doubt on the following basis:

(i) Section 16(3) does not qualify the expression 'property' either with 'ancestral or self-acquired' property. It sets out an express mandate that such children are only entitled to the property of their parents and not of any other relations;

(ii) Once children born from a *void* marriage (or a *voidable* marriage which has been declared to be nullity) are declared to be legitimate by sub-sections (1) and (2) of Section 16, they cannot be discriminated against

[4] At page 732, para 2
[5] (2006) 9 SCC 612
[6] (2010) 11 SCC 483
[7] At page 513, para 29
[8] (2011) 11 SCC 1

and will be on par with other legitimate children for the purpose of all the rights in the property of their parents, both self-acquired and ancestral[9];

(iii) Section 16 was amended by Act 68 of 1976. As a consequence of the amendment, the common law view that children of a marriage which is *void* or *voidable 'are illegitimate' 'ipso jure'* has to change completely[10]. The law has a socially beneficial purpose of removing the stigma of illegitimacy faced by children of such marriages, since the children themselves are innocent;

(iv) The benefit of Section 16 (3) is available only when there is a marriage but the marriage is either *void* or *voidable* in view of the provisions of the legislation;

(v) In the case of joint family property, children born from a *void* or *voidable* marriage will only be entitled to a share in their parents' property but not in their own right:

> "38…Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the lifetime of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents."

(vi) While the relationship between the parents may not be sanctioned by law, the birth of a child in such a relationship has to be viewed

[9] At para 29 page 9
[10] At para 36 page 10

independently of such relationship. The interpretation of Section 16(3) must be based on the constitutional values of equality of status and opportunity as well as individual dignity;

(vii) A child born in such a relationship is innocent and is entitled to all the rights which are given to other children born in a valid marriage subject to the limitation that the right is confined to the property of the parents; and

(viii) Section 16(3) as amended does not impose any restriction on the property rights of the children born of a *void* or *voidable* marriage except limiting it to the property of their parents. Hence, such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral.

Thus, the present reference arises before this three judge Bench.

B. Statutory conferment of legitimacy

4. Section 5 of the HMA 1955 specifies, as the marginal notes indicates, *'Conditions for a Hindu Marriage'*[11].

[11] 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.

5. Section 11 stipulates that a marriage solemnised after the commencement of the Act shall be *null* and *void* and be so declared by a decree of nullity if (i) either party has a spouse living at the time of the marriage; (ii) parties are within the degrees of prohibited relationship except where a custom or usage governing them permits of a marriage; and (iii) parties are sapinda of each other, unless a custom or usage governing them permits of a marriage.[12]

6. Section 12 provides for the circumstances in which a marriage shall be voidable and may be annulled by a decree of nullity.[13]

7. Section 16 as it was originally enacted provided as follows:

> "16. Legitimacy of children of void and voidable marriages.—Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12 any child begotten or conceived before the

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[12] 11. Void marriages.- Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i),(iv) and (v) of section 5.

[13] 12. *Voidable marriages*. — (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely—

(*a*) that the marriage has not been consummated owing to the impotence of the respondent; or

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of Section 5; or

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1), shall be entertained if—

(*i*) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commencement of thisAct within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by thepetitioner of the existence of the said ground."

> decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:
>
> Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity 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."

8. While Section 16, as originally enacted, protected the legitimacy of children of *void* and *voidable* marriages, its applicability was conditioned by four requirements namely:

(i) The existence of a marriage;

(ii) The marriage should be *void* under Section 11 or *voidable* under Section 12;

(iii) There must be a decree annulling the marriage under Section 11 or Section 12; and

(iv) The child should have been begotten or conceived before the decree was made.

9. The manner in which Section 16 was drafted gave rise to two consequences: *firstly*, the status of legitimacy granted to a child born from a *void* or *voidable* marriage was conditional upon the marriage being annulled by a decree of annulment. Absent a decree of annulment, the child would continue to be 'illegitimate'. If the parties had not moved a court and obtained a decree, the

protection under Section 16 was not available. *Secondly*, children born from *void* or *voidable* marriages were artificially divided into two groups, those born of a marriage performed prior to the enactment of the legislation and those born after its enactment.

10. The anomalies in the erstwhile provisions of Section 16 were succinctly summarised in the judgment of this Court in **Parayankandiyal Eravath Kanapravan Kalliani Amma (Smt)** v **K Devi**[14]. The Court noted:

> "58. In spite of the foresightedness of the legislators, the intention of Parliament could not be fully reflected in the Act which unfortunately suffered at the hands of persons who drafted the Bill and the various provisions contained therein. The results were startling. Since the Rule of Legitimacy was made dependent upon the marriage (void or voidable) being annulled by a decree of annulment, the children born of such marriage, would continue to be illegitimate if the decree of annulment was not passed, which, incidentally, would always be the case, if the parties did not approach the court. The other result was that the illegitimate children came to be divided in two groups; those born of marriage held prior to the Act and those born of marriage after the Act. There was no distinction between these two groups of illegitimate children, but they came to suffer hostile legislative discrimination on account of the language employed therein. Indeed, language is an imperfect instrument for the expression of human thought."

11. The Fifty-ninth Report of the Law Commission of India (March 1974) elaborated upon the status of children born of a *void* marriage. Paragraph 2.36 of the Report elaborated that there were four possible premises to adopt, which were thus:

[14] (1996) 4 SCC 76

> "2.36. …With reference to the status of children born of a void marriage, theoretically, four principal views are possible:-
>
> (i) One view is that such children must be regarded as illegitimate, because a void marriage has, in law, no existence, and the children of such a marriage can only be regarded as *filius nullius;*
> (ii) The second view is that they should be entitled to succeed to their parents, as if they were legitimate, provided that the parents had contracted the marriage *bona fide* and without knowledge of any impediment;
> (iii) According to the third view, they should, in all cases, be entitled to succeed to their parents as if they were legitimate;
> (iv) There could be a fourth view, namely, that they must be entitled to succeed to other relations in all cases."

The Law Commission noted that the legislature had adopted the third view. The report noted:

> "The Hindu Marriage Act, however, has already adopted the third view it would be a retrograde step if it now reverts to the second view. That apart, the third view is absolutely more fair to the innocent off-spring of the marriage, and more in harmony with modern social notions. We are, therefore, of the opinion that there is no justification for reverting to the second view."

Section 16 was amended by Act 68 of 1976. As amended, Section 16 provides as follows:

> "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."

12. In **Kalliani Amma** (supra), a two judge Bench held that Section 16 as it was originally enacted 'discriminated between two groups of illegitimate children in the matter of conferment of status of legitimacy' and was hence violative of Article 14. The Court noted that in its earlier form, Section 16 was linked with Sections 11 and 12. While holding that the substituted Section 16 is constitutional, the Court analysed the impact of the non- obstante provision in sub-section 1. The Court held:

> "78. The words "notwithstanding that a marriage is null and void under Section 11" employed in Section 16(1) indicate undoubtedly the following:
>
> (*a*) Section 16(1) stands delinked from Section 11.
>
> (*b*) Provisions of Section 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigour in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contravened.

> (*c*) Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) was amended.
>
> (*d*) Mischief or the vice which was the basis of unconstitutionality of unamended Section 16 has been effectively removed by amendment.
>
> (*e*) Section 16(1) now stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy.
>
> Section 16, in its present form, is, therefore, not ultra vires the Constitution."

Section 16 was held to be *intra vires.* The Court held that Section 16 enacts a legal fiction: by a rule of '*fictio juris'* the legislature has provided that children, though "illegitimate", shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable. Interpreting the legal fiction in Section 16, the Court in **Kalliani Amma** observed that "illegitimate children, for all practical purposes, including succession to the property of their parents have to be treated as legitimate". However, "they cannot …succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents":

> "82. In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."

13. Section 2 of the HMA 1955 contains provisions for the application of the Act[15]. Under clause (a) to the Explanation, where both the parents of a child are Hindus, Buddhists, Jainas or Sikhs 'by religion', the child, whether legitimate or illegitimate, would also be a Hindu, Buddhist, Jain or Sikh, as the case may be. Under clause (b) where one of the parents professes any of the four religions, the child would be regarded as Hindu, Buddhist, Jain or Sikh, whether the child is legitimate or illegitimate. Clauses (a) and (b) of the Explanation indicate that the legitimacy of a child, one or both of whose parents profess Hinduism, Buddhism, Jainism or Sikhism, is not relevant to the applicability of the Act to the child.

14. Sub-section (1) of Section 16 provides a declaration of legitimacy ("shall be legitimate") to a child born of a void marriage, while sub-section (2) contains a deeming consequence of the legitimacy of a child ('shall be deemed to be their

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[15] **2. Application of Act** - (1) This Act applies

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. - The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

legitimate child") born of a voidable marriage in the situations envisaged in the respective provisions. Sub-section (1) governs a situation where a marriage is *null* and *void* under Section 11. Sub-section (2) deals with a situation where a decree of nullity is granted in respect of a voidable marriage under Section 12. Sub-section (1) declares that a child born from a marriage that is *void* under Section 11 "shall be legitimate" if such a child would have been legitimate if the marriage had been valid. The declaration of legitimacy under sub-section (1) operates whether the child is born before or after the commencement of Act 68 of 1976 which substituted the provisions of Section 16 and whether or not

(i) a decree of nullity was granted in respect of a marriage; and

(ii) the marriage was held to be *void* otherwise than on a petition under the enactment.

15. In contrast to sub-section (1), sub-section (2) embodies a deeming consequence of legitimacy, contingent on a decree of nullity under Section 12 where the child is "begotten or conceived" before the decree is made, if the child would have been the legitimate child of the parties to the marriage if it was dissolved instead of being annulled on the date of the decree. Once the conditions in sub-sections (1) and (2) are met, both the provisions essentially protect the legitimacy of the child.

C. Rights in or to the property of parents

16. Sub-section (3) of Section 16 commences with a non-obstante provision ("nothing contained in sub-section (1) or sub-section (2)"). Parliament while enacting sub-section (3) intends to ensure that the legislative conferment of

legitimacy will not confer upon such a child born from a *void* or voidable marriage as the case may be, “any rights in or to the property of any person other than the parents” where, but for the passing of the legislation, the child would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate child of the parents. There are two crucial expressions in sub-section (3): the first is “any rights in or to the property of any person other than the parents”; and the second is “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”. Sub-section (3), in other words, circumscribes the consequence of the legislative protection of the legitimacy of the child in relation to the conferment of rights in property. But for sub-section (3), the conferment of legitimacy on a child from a *void* or voidable marriage would have placed the child, for all intents and purposes, at par with a legitimate child in matters relating to property. The frame of sub-section (3), however, indicates that the conferment of legitimacy will not confer upon the child rights in or to the property of a person other than the parents. Sub-section (3) implicitly recognizes that the child conferred with legitimacy by virtue of the provisions of sub-sections (1) and (2) would be entitled to rights in or to the property of the parents of the child. But the provision equally indicates that the conferment of legitimacy will not operate to confer rights in or to the property of persons who are not the parents of the child. This stipulation is, however, conditioned by the last part of sub-section (3) which provides that such a child would not have rights in or to the property of a person who is not a parent where but for the passing of the Act the child would have been incapable of possessing or acquiring such rights by reason of not being the legitimate child. This

last part of sub-section (3), takes us back to the position as it stood before the passing of the Act. If, but for the enactment of the provision the child would not have been capable of possessing or acquiring rights over the property of any person other than the parents by virtue of the 'illegitimacy', the child will not have rights to or in the property of a third party (other than the parents). By its plain terms, Section 16(3) indicates that Parliament, while conferring legitimacy on a child born from a *void* or voidable marriage, confined the rights of the child to or in the property of the parents and not a party other than the parents.

D. Issues in the reference

17. The reference essentially raises the following issue: whether a child who is conferred with legislative legitimacy under Section 16(1) or 16(2) 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 questions that arise before us are - **first,** whether the legislative intent is to confer legitimacy on a child covered by Section 16 in a manner that makes them coparceners, and thus entitled to initiate or get a share in the partition - actual or notional; **second**, at what point does a specific property transition into becoming the property of the parent. For, it is solely within such property that children endowed with legislative legitimacy hold entitlement, in accordance with Section 16(3).

18. The answer to the latter question would primarily depend on interpretation of the phrase 'any rights in or to the property of any person, other than the parents'. In order to understand the ambit of the phrase, and the scope of the right, it would become necessary to analyse the provisions of the Hindu Succession Act 1956.

19. At this stage, it would be necessary to dwell on the fundamental precepts underlying the institution of the Hindu Undivided Family. Later, having dwelt on those precepts, the focus of the judgment will turn to the manner in which the HSA 1956 has (i) regulated the devolution of interest in coparcenary property; (ii) prescribed general rules of succession; and (iii) stipulated principles for the distribution of property.

E. Submissions

20. In the backdrop of the reference, and the legal position as stated above, we shall now avert to the submissions with respect to the interpretation of Section 16(3) and the legislative intent behind the conferment of legitimacy.

The **first,** more expansive, formulation may be summarised as follows: i) property of the parent includes the share in the coparcenary property - once the larger coparcenary (including the father and his father, brothers, etc. is partitioned, the property must then be divided between the father and all his children, including those covered by Section 16; ii) the provision confers all the connotations of legitimacy on the children - including coparcenary rights in the property of the father.

On the other hand, according to the **second** formulation i) the property in the hands of the father after the partition from the larger coparcenary, is still coparcenary property belonging to the father *as well as the* children (who are per se considered legitimate); as such, it is not the 'property of the parent' as per Section 16(3), HMA and thus, the children under Section 16(3), have no right in it; ii) the intention of the legislature was merely to erase the stigma, and not to interfere with the structure of a coparcenary which does not include the children covered by Section 16; and iii) thus, under Section 16(3), the only right is with respect to the self-acquired/ self-earned property of the parent.

The more expansive interpretation is sought to be substantiated on the basis of the following formulations:

a. Children cloaked with legitimacy under Section 16(3) of the HSA 1956 are to be considered legitimate for the purpose of partition within the branch of the father. They cannot claim partition in the <u>larger coparcenary</u>, but once the larger coparcenary is partitioned- notionally or actually, and the property comes in the hands of the father, all his children – legitimate per se or legitimate by reason of S.16(3), have the same right in partition of this property in the hands of the father. In other words, the only difference between a legitimate child and a child conferred with legitimacy under Section 16(3) is that after the death of the father, the latter cannot claim partition in the larger coparcenary, unlike the children who are per se legitimate. This limitation on their right ends once the father's share in the larger coparcenary is determined. In the share of the father- once determined and separated from

the larger coparcenary, they have the same rights as the children who are legitimate[16].

b. The purpose of the Amendment is not just to eliminate the stigma experienced by the children of void or voidable marriages, but to treat all legitimate children alike. It is the logical corollary of the legal fiction, which cannot be overlooked. Once a legal fiction is created, as has been created by Section 16(3), all inevitable corollaries thereof, including rights in the coparcenary property are also assumed[17].

c. Section 16(3) does not qualify the word "property" with ancestral/coparcenary or separate/self-acquired. Therefore, inserting such a qualification to exclude the coparcenary property of the parent would be legislation by the court[18]. To deny the right to the property of the parents, including the coparcenary property, to such children born out of a void or voidable marriage, is unduly harsh[19].

d. The legislative intent of Act 68 of 1976 is to treat *all* legitimate children equally, as coparceners[20]. Once the children born out of void and voidable marriages have been treated as legitimate, there can be no discrimination between them and the other legitimate children born out of lawful marriages.[21]

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[16] Written submissions on behalf of appellant in Revanasiddappa & Anr. vs. Mallikarjun & Ors. by Kiran Suri, Sr. Advocate, page 3-4

[17] Written submissions on behalf of the Petitioners in Balkrishna Pandurang Halde vs Yeshodabai Balkrishna Halde by Mr. Sudhanshu Choudhari, page 2, para 3

[18] Written submissions on behalf of the Petitioners in Balkrishna Pandurang Halde vs Yeshodabai Balkrishna Halde by Mr. Sudhanshu Choudhari, page 7, para 2

[19] Written note submitted on behalf of the appellants in Revanasiddappa vs Mallikarjun by Dr. Ravindra Chingale, page 2

[20] Written submissions on behalf of the Petitioners in Balkrishna Pandurang Halde vs Yeshodabai Balkrishna Halde by Mr. Sudhanshu Choudhari, page 7, para 3

[21] Brief Notes of Arguments in Rejoinder on Behalf of Respondent No.4 in Mankarnabai vs Niranjan, by Mr. AIS Cheema, Sr. Advocate, page 8.

e. Section 2 of the HSA 1956 makes the Act, including S. 6, which deals with coparcenary property, applicable to the children born out of void/voidable marriages. Section 10 Rule 1 of the Hindu Succession Act does not distinguish between heirs born out of void or voidable marriages and those born out of a legal marriage. Class I heirs are similarly not distinguished on the basis of legitimacy under the Act. Impliedly, the law overall, for all purposes including notional and actual partition does not intend different treatment among legitimate children, for all purposes, including the rights in and to the coparcenary property of the parents. The child conferred with legitimacy need not be a coparcener in order to be entitled to such a right.[22]

f. The latter part of Section 16(3) states- "*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*". Section 4 gives an overriding effect to the provisions of the Act in matters specifically covered thereunder. The Act does not define a "coparcenary". Therefore, the position of law prior to the enactment of the Hindu Succession Act applies with respect to "coparcenary". Under the law, as it stood then, children born from the same male ancestor were all considered coparceners, regardless of legitimacy.[23]

g. Limited reading of S.16(3) violates the property rights of the children born out of void or voidable marriages under Article 300A of the Constitution of India[24].

[22] Written submissions of Mr. Nikhil Majithia, in Sri. Eshwarachari vs Smt. Sarojamma, page 4.
[23] Written submissions of Mr. Nikhil Majithia, in Sri. Eshwarachari vs Smt. Sarojamma, page 4-5.
[24] Written submissions on behalf of the Petitioners in Balkrishna Pandurang Halde vs Yeshodabai Balkrishna Halde by Mr. Sudhanshu Choudhari, page 8

The above, interpretation is questioned on the basis of the following formulations:

a. There is a difference between conferring legitimacy on a child and elevating them to the status of a coparcener. While Section 16 of the HMA 1955 grants legitimacy, Section 16(3) clarifies the extent of inheritance rights.[25] This distinction becomes clear through the decision in **Jinia Keotin**, where the court held that children covered by Section 16(3) have rights limited to their parents' property.[26]
b. Article 14 of the Constitution of India allows reasonable classification with an intelligible differentia, which justifies treating children from various marriages differently due to distinct legal status. This classification safeguards the interests of both legitimate offspring and innocent co-parceners, ensuring a balanced approach.[27]
c. The legislative intent behind Section 16 is to bestow legitimacy and inheritance rights upon children from void and voidable marriages. However, these rights are intentionally confined to parental property, excluding coparcenary or ancestral property, as evidenced by the legislative history and objectives.[28]
d. The Legislature has intervened multiple times to address inheritance rights of legitimised children:

[25] Submitted by Shri K. Radhakrishnan, Senior Advocate on behalf of the Respondents in Revanasiddappa and Anr v. Mallikarjun and Ors, C.A No. 2844 of 2011
[26] Submitted by Mr. PB Suresh on behalf of the Respondents in Baby @ Rohini (Since Deceased) through her legal heirs & Ors v. Kamalam Kumaresan and Ors, SLP © 14176-14177 of 2016
[27] Submitted by Shri K. Radhakrishnan, Senior Advocate on behalf of the Respondents in Revanasiddappa and Anr v. Mallikarjun and Ors, C.A No. 2844 of 2011
[28] Submitted by Mrs V. Mohana, Senior Advocate on behalf of the Respondents in Baby @ Rohini (Since Deceased) through her legal heirs & Ors v. Kamalam Kumaresan and Ors, SLP © 14176-14177 of 2016

i. Initial HMA Provision (Section 16): The enactment of the Hindu Marriage Act (HMA) included Section 16, establishing children from void or voidable marriages as legitimate children their parents.

ii. 1976 Amendment to Section 16: In 1976, Section 16 of the HMA was amended to rectify issues causing discrimination.

iii. HSA Amendment (Section 6(3)): Section 6 of the Hindu Succession Act (HSA) was amended, introducing Section 6(3) that enforces notional partition of parents' undivided interest in coparcenary property.[29]

Thus, there is no legislative vacuum as far as the rights of the children born out of void or voidable marriages are concerned. As such, judicial intervention to broaden the scope of the rights of such children is not warranted.

e. Through various amendments, Parliament has ensured that these children possess inheritance rights within the scope of their parents' property.[30] This process has converted inherited property into the parents' self-acquired property, thereby enabling legitimate children to utilize the benefits outlined in Section 16 of the HMA. In such instances, the Parliament's interventions were aimed at reconciling the Mitakshara Law with the evolving considerations of public policy, thereby striking a balance between safeguarding the interests of these children and other coparceners.[31]

[29] Submitted by Mr Vivek Chib, Senior Advocate on behalf of the Respondents No. 71 and 81 in Baby @ Rohini (Since Deceased) Rep by her Legal Representatives and Ors v Kamalam Kumaresan and Ors, SLP (C) No. 14176-14177 of 2016

[30] Submitted by Mrs V. Mohana, Senior Advocate on behalf of the Respondents in Baby @ Rohini (Since Deceased) through her legal heirs & Ors v. Kamalam Kumaresan and Ors, SLP © 14176-14177 of 2016

[31] Submitted by Mr Vivek Chib, Senior Advocate on behalf of the Respondents No. 71 and 81 in Baby @ Rohini (Since Deceased) Rep by her Legal Representatives and Ors v Kamalam Kumaresan and Ors, SLP (C) No 14176-14177 of 2016

f. The 1976 Amendment was intended to clarify and reinforce the limited scope of inheritance rights under Section 16.[32] This is exemplified by the decision in **Ashwani Kumar** v. **Union of India**[33], which demonstrates how legislative actions and amendments consistently address potential legal voids, ensuring no gaps in the law concerning the inheritance rights of all legitimate Children.

F. Joint Hindu family and coparcenary under Mitakshara

21. Traditionally, a Joint Hindu family comprises of male members who are lineal descendants from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. A Joint Hindu family has been described as 'a larger body' consisting of a group of persons united by sapindaship or family relationship[34].

22. A Hindu coparcenary comprises of a propositus and three lineal descendants. A Hindu coparcenary is a body which is narrower than a Hindu Undivided Family. Before 2005, it included only sons, grandsons and great-grandsons who were holders of joint property.[35] (**Vineeta Sharma** v. **Rakesh Sharma**[36] **("Vineeta Sharma")**.

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[32] Submitted by Mr. Samrat K Shinde, Advocate on Record on behalf of the Respondents in Hanumant Namdeo Jadhav & Ors v Kashibai Namdeo Jadhav & Ors, SLP (C) No. 27834 of 2017

[33] (2020) 13 SCC 585

[34] Sunil Kumar v. Ram Prakash:(1988) 2 SCC 77; Smt Sitabai v. Ramchandra : (1969) 2 SCC 544; Gowli Buddanna v. CIT, Mysore, Bangalore : AIR 1966 SC 1523; Surjit Lal Chhabda v. Commissioner of Income Tax Bombay : (1976) 3 SCC 142

[35] "23. Hindu coparcenary is a much narrower body. It consists of propositus and three lineal descendants. Before 2005, it included only those persons like sons, grandsons and great-grandsons who are the holders of joint property. For example, in case *A* is holding the property, *B* is his son, *C* is his grandson, *D* is great-grandson, and *E* is a great-great-grandson. The coparcenary will be formed up to *D* i.e. great-grandsons, and only on the death of *A*, holder of the property, the right of *E* would ripen in coparcenary as coparcenary is confined to three lineal descendants. Since grandsons and great-grandsons become coparceners by birth, they acquired an interest in the property."

[36] (2020) 9 SCC 1

23. In **State Bank of India** v. **Ghamandi Ram**[37] **("Ghamandi Ram")**, this Court observed that under the Mitakshara school of Hindu law, all the property of a Hindu Joint Family is held in collective ownership by all the coparceners in a "quasi-corporate capacity". The Court held that the incidents of a coparcenary are that:

(i) The lineal male descendants of a person up to a third generation acquire on birth ownership in the ancestral properties of such person;

(ii) Such descendants can at any time work out their rights by seeking partition;

(iii) Until partition, the ownership of every member of the coparcenary extends over the entire property conjointly with the rest;

(iv) The consequence of such co-ownership is that possession and enjoyment of the properties is common;

(v) No alienation of the property is possible unless it is for a necessity, without the concurrence of the coparceners; and

(vi) The deceased member's interest in a coparcenary lapses on his death in favor of his survivors.

24. The hallmark of a coparcenary is that a lineal male descendent up to the third generation would acquire an independent right of ownership by birth and the interest of a deceased member would lapse on his death and merge in the coparcenary property. A member of the coparcenary has a right to demand partition. Until partition, the property is jointly owned by all, and individual shares cannot be predicated by coparceners. The principles enunciated in **Ghamandi**

[37] (1969) 2 SCC 33

Ram (supra) were analysed and formulated in **Controller of Estate Duty, Madras** v. **Alladi Kuppuswamy**[38], where the Court held:

> "33. …a Hindu coparcenary has six essential characteristics, namely, (1) that the lineal male descendants up to the third generation acquire an independent right of ownership by birth and not as representing their ancestors; (2) that the members of the coparcenary have the right to work out their rights by demanding partition; (3) that until partition, each member has got ownership extending over the entire property conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive; (4) that as a result of such co-ownership the possession and enjoyment of the property is common; (5) that there can be no alienation of the property without the concurrence of the other coparceners unless it be for legal necessity; and (6) that the interest of a deceased member lapses on his death and merges in the coparcenary property."

25. In **State of Maharashtra** v. **Narayan Rao Sham Rao Deshmukh**[39], this Court while reiterating that a Hindu coparcenary is a narrower body than a joint family observed:

> "40…
>
> "*8*…Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary. *A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener*. A joint family, however, may consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters."

[38] (1977) 3 SCC 385
[39] (1985) 2 SCC 321

The Court noted that the property of a joint family does not cease to belong to the family merely because only a single male member is left in the family. The Court elaborated on the distinction between the position in Mitakshara Hindu law and Dayabhaga law, observing:

> "40…
> 8…
> While under the Mitakshara Hindu law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law, there is no unity of ownership of coparcenary property with the members thereof. Every coparcener takes a defined share in the property and he is the owner of that share. But there is, however, unity of possession. The share does not fluctuate by births and deaths. Thus it is seen that the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family in the Dayabhaga law."

Mitakshara law is founded on a community of interest which entails that the ownership of coparcenary property vests in the whole body of coparceners, jointly. The interest of a member of the coparcenary is a fluctuating interest, one which is capable of being enlarged by deaths and diminished by births in the family. On partition, however, the coparcener's share crystallizes, and they become entitled to a definite share. These principles have been reiterated in **Vellikannu** v. **R Singaperumal**[40] and **Rohit Chauhan** v. **Surinder Singh**[41]. The interest of a coparcener is in that sense referred to as 'an undivided coparcenary' (see in this context, the decision of the Privy Council in **Katama Natchier** v. **Rajah of**

[40] (2005) 6 SCC 622
[41] (2013) 9 SCC 419

Shivagunga[42]). The decision of the three judge Bench in **Vineeta Sharma** (supra) comprehensively analyses the precedents on the subject.

G. Hindu Succession Act 1956

26. Section 6 of the HSA 1956 provides for the devolution of interest in coparcenary property in a joint Hindu family governed by Mitakshara law. Prior to its substitution by Act 39 of 2005, Section 6 provided as follows:

> "6. Devolution of interest in coparcenary property. - When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:
> Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
> Explanation 1. – For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
> Explanation 2. – Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

27. Section 6, as it stood prior to the amendment, provided that the coparcenary interest of a male Hindu who died after the commencement of the Act, would devolve by survivorship. Section 6, in other words, excluded the devolution of

[42] 1863 SCC OnLine PC 11

property by testamentary or intestate succession by expressly incorporating the principle of survivorship. The proviso to Section 6 however contained an exception where the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative of the class who claimed through such a female relative in which case the interest of the deceased in the Mitakshara coparcenary property would devolve by testamentary or intestate succession of property under the Act and not by survivorship. Explanation 1 to Section 6 contained a deeming fiction according to which for the purpose of the Section, the interest of a Hindu Mitakshara coparcener was deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death.

28. The provisions of Section 6, as they stood prior to the amendment, came up for consideration before a three-judge Bench of this Court in **Gurupad Khandappa** v. **Hirabai Khandappa Magdum**[43]. In that case, **Khandappa,** who had an interest in Mitakshara coparcenary property, died on 27 June 1960 leaving his wife Hirabai, his two sons, and three daughters. Hirabai instituted a suit for partition. Since the widow and daughters were amongst the family relatives specified in Class I of the Schedule, the proviso to Section 6 came into play and the normal rule of survivorship was excluded. This Court noted that the plaintiff's relief was determined by two things: (i) her share in her husband's share; and (ii) her husband's own share in the coparcenary property. Since the deceased was survived by two sons, three daughters and his widow, the Court observed that each

[43] (1978) 3 SCC 383

of the six sharers would have an equal share of 1/6th. The next step was to determine the share which the deceased had in the coparcenary property. Elaborating on that, the Court held:

> "9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that the interest of a Hindu Mitakshara coparcener shall be *deemed to be* the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the plaintiff, not being a coparcener, was not entitled to demand partition yet if a partition were to take place between her husband and his two sons she would be entitled to receive a share equal to that of a son. (See *Mulla's Hindu Law*, 14th Edn. p. 403, para 315). In a partition between Khandappa and his two sons there would be four sharers in the coparcenary property the fourth being Khandappa's wife, the plaintiff. Khandappa would have therefore got a 1/4th share in the coparcenary property on the hypothesis of a partition between himself and his sons."

In a notional partition of the coparcenary property between him, his widow and his 2 sons, **Khandappa** would have obtained a 1/4th share. The share of the plaintiff in his 1/4th share was 1/6th, i.e. 1/24th. This Court held that there was no justification to limit the share of the plaintiff to 1/24th by ignoring the 1/4th share which she would have obtained had there been an actual partition during her husband's lifetime between him and his two sons. The Court held that the Explanation to Section 6 "compels the assumption of a fiction" that in fact a partition of the property had taken place immediately before the death of the person in whose property the heirs claimed a share. This Court held:

> "13. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, *in addition to* the share which he or she received or must be deemed to have received in the notional partition."

29. In its 174th Report titled "Property Rights of Women: Proposed Reforms Under the Hindu Law" (5 May 2000). The Law Commission of India noted that "the exclusion of daughters from participating in the ownership of coparcenary property

merely by reason of their sex is unjust". By the time that the Law Commission submitted its report, it noted that Andhra Pradesh, Tamil Nadu, Maharashtra, and Karnataka had incorporated amendments that would ensure that in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son (see paras 3.1 and 3.2.1). Kerala, the Law Commission noted, had gone a step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime based on the mere fact that he or she was born in the family. "The report of the Law Commission led to the amendments of 2005 in the HSA 1956.

30. Section 6 of the HSA 1956 was substituted by Act 39 of 2005. The HSA 2005 commenced on 9 September 2005. Section 6 (1) as amended provides as follows:

> "6. Devolution of interest in coparcenary property.—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,— (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."

The Statement of Objects and Reasons accompanying the introduction of the Bill noted that:

> "**Statement of Objects and Reasons**…
>
> Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution."

31. The Parliamentary amendment, as the Statement of Objects and Reasons indicates, "proposed to remove the discrimination as contained in Section 6…by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have". The Amendment also omitted Section 23 which disentitled a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs chose to divide their respective shares.

The impact of the substitution of Section 6 of Act 39 of 2005 is that a daughter of a coparcener shall

(i) become a coparcener in her own right by birth in the same manner as a son;

(ii) have the same rights in the coparcenary property as she would have if she had been a son; and

(iii) be subject to the same liabilities in respect of the coparcenary property as a son.

32. Amended Section 6(3) provides as follows:

> "(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—
>
> (a) the daughter is allotted the same share as is allotted to a son;
>
> (b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.
>
> *Explanation*.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

33. Before the Amendment, Section 6 provided that on the death of "a male Hindu", his interest in Mitakshara coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the mode of succession provided in the Act. Section 6 (3) of the amended provision now stipulates that on "a Hindu" dying after the commencement of the amending Act, his interest in the property of a joint Hindu family governed by Mitakshara law devolves by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

34. In **Vineeta Sharma**, this Court held:

> "60…The conferral of right 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. Though the rights can be claimed, w.e.f. 9-9-2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener."

35. The Amending Act of 2005 substituted Section 6 of the HSA 1956 for the erstwhile provision. The insertion of sub-sections (1) and (2) conferred coparcenary rights on daughters in Joint Hindu families governed by Mitakshara law. Property to which a female Hindu becomes entitled under sub-section (1) shall be held, in terms of sub-section (2), by her with the incidents of coparcenary ownership and is capable of being disposed of by testamentary disposition. Sub-section (3) of Section 6 has introduced a significant change in the devolution of the interest in the property of a Joint Hindu family governed by Mitakshara law. Where a Hindu has died after 9 September 2005 (the date of commencement of the Amending Act), his interest in terms of sub-section (3) devolves by testamentary or intestate succession, as the case may be, under the Act and not by survivorship. Prior to the amendment, the substantive part of Section 6 stipulated that the interest of a male Hindu in Mitakshara coparcenary property at the time of his death shall

(i) devolve by survivorship upon the surviving members of the coparcenary; and

(ii) not devolve in accordance with the Act.

The proviso, however, enunciated an exception where the deceased had left behind a surviving female relative specified in Class I of the Schedule or a male relative in the class who claimed through such a female relative. Where the proviso applied, it stipulated that the interest of the deceased male Hindu shall

(i) devolve by testamentary or intestate succession, as the case may be, under the Act; and

(ii) not devolve by survivorship.

36. The principle of devolution by testamentary or intestate succession under the Act which was an exception prior to the Amending Act as set out in the proviso has now become the norm in sub-section (3) of Section 6. The daughter is in terms of sub-section (3) entitled to the same share as is allotted to a son. Prior to the Amendment of 2005, Explanation I defined in deeming terms the interest of a Hindu Mitakshara coparcener. According to Explanation I, the interest of a Hindu Mitakshara coparcener was deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether or not he was entitled to claim partition. Explanation I as it stood prior to the Amending Act of 2005 has been introduced by the legislature as an Explanation to sub-section (3), post amendment. The Explanation to sub-section (3) mandates that the interest of a Hindu Mitakshara coparcener would be ascertained on the basis that a partition has taken place of the property immediately before his death. His interest is deemed to be the share in the property which would have been allotted in a partition at a point of time immediately before his death, irrespective of whether or not he was entitled to seek partition.

37. The crucial words of sub-section (3) of Section 6, for the present purposes, are "shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship". Section 8 provides for the general rules of succession applicable to the devolution of the property of a male Hindu dying intestate.[44] The property devolves firstly, on the heirs specified in Class I of the Schedule; if there is no heir of Class I, then, on the heirs specified in Class II; if there is no heir in any of the two classes, on agnates and if there are no agnates, then upon the cognates of the deceased. Section 9 provides for the order of succession among the heirs in the Schedule. Section 10 provides for the distribution of property among heirs in Class I of the Schedule in the following terms:

> "10. **Distribution of property among heirs in class I of the Schedule.—** The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:—
> Rule 1.— The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.
> Rule 2.— The surviving sons and daughters and the mother of the intestate shall each take one share.
> Rule 3.— The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.
> Rule 4.— The distribution of the share referred to in Rule 3—
>
> (i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows

[44] 8. General Rules of Succession in the case of males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

> together) and the surviving sons and daughters gets equal portions; and the branch of his predeceased sons gets the same portion;
> (ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions."

38. In terms of Section 10, the division of property of an intestate among the heirs in Class - I is governed by the four Rules extracted above. They stipulate that

(i) the widow or if there is more than one all of them together shall take one share;

(ii) the surviving sons and daughters and mother shall each take one share; and

(iii) heirs in the branch of each pre-deceased son or each pre-deceased daughter take between them one share.

39. Rule 2 of Section 10 stipulates that "the surviving sons and daughters and the mother of the intestate shall each take one share". In using the expression "surviving sons and daughters" the HSA 1956 has not made any distinction based on the legitimacy of the child. Parliament, following well-settled principles of interpretation, would be cognizant of the legitimacy granted by the provisions of Section 16 of the HMA 1955 and the widening of the protection by the substitution of the provision in 1976. There is no reason or justification to qualify the provisions of Rule 2 of Section 10 with reference to the legitimacy of the child. Hence in dividing the property of an intestate in terms of Section 10 of the HSA 1956, no distinction can be made on the basis of such a classification, once such a child is deemed legitimate under Section 16 of the HMA 1955. Such a construction shall also accord with the provisions of sub-Section 3 of Section 16 of the HMA 1955

which enunciates that the conferment of legitimacy by sub-Section (1) or sub-Section (2) shall not confer on a such a child "any rights in or to the property of any person, other than the parents."

40. Section 10 of the HSA 1956 provides for the division of "the property of an intestate" among the heirs in Class-I of the Schedule. The expression "property of an intestate'" means property that belongs to the intestate. The Explanation to sub-Section (3) of Section 6 provides for the ascertainment of the interest of a Hindu Mitakshara coparcener which is deemed to be the share in the property that would have been allotted to him if a partition had taken place immediately before his death. That share as ascertained in terms of the Explanation to sub-Section (3) of Section 6 would devolve on the basis of the principles enunciated in Section 8 and has to be distributed among the Class-I heirs in terms of Section 10. Class-I of the Schedule is in the following terms:

> "Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a predeceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a predeceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son; [son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son]."

41. For the purpose of the distribution of the property of the deceased, Class-I uses the expression 'son' and 'daughter'. The property which falls for distribution is the share of the deceased in the coparcenary property on the basis of a notional partition having taken place immediately prior to the death. The property to be

distributed is that of the deceased. The Explanation to sub-Section (3) of Section 6 postulates that a notional partition has taken place immediately prior to the death of the coparcener and his interest is deemed to be the share that would have been allotted to him in such a partition. The legislature, in other words, has provided for the ascertainment of the share of the deceased on a notional basis. The expression 'share in the property that would have been allotted to him if a partition of the property had taken place' indicates that this share represents the property of the deceased. Where the deceased dies intestate, the property would devolve in terms of Section 8 and the distribution would be governed by the Rules specified in Section 10.

H. Property of the Parents

42. When a Hindu dies after the commencement of the Amending Act of 2005, his interest in the property of a Joint Hindu family governed by Mitakshara law has to devolve by testamentary or intestate succession and not by survivorship, as stipulated in sub-Section (3) of Section 6. The interest of a Hindu Mitakshara coparcener, for the purpose of sub-Section (3) has to be ascertained on the basis that a notional partition has taken place immediately before his death. The share in the property that would have been allotted to the intestate on the basis of such a notional partition is governed by the General Rules of Succession specified in Section 8, HSA 1956. The distribution of the property among the Class-I heirs is governed by the Rules specified in Section 10. In the distribution *inter alia* the surviving sons, daughters and mother of the intestate take one share each and likewise the widow (and all the widows together if there was more than one) take

one share. In the distribution of the property of the deceased who has died intestate, a child who is recognised as legitimate under sub-Section (1) of Section 6 of the HMA 1955 or under sub-Section (2) of Section 16 would be entitled to a share. Since this is the property that would fall to the share of the intestate after notional partition, it belongs to the intestate. Under Section 16(3), a child conferred with legitimacy is entitled to the property of their parents only, and does not have any rights to or in the property of a person other than the parents. Hence, where the deceased has died intestate, the devolution of this property must be among the children - legitimate as well as those conferred with legitimacy by the legislature under Section 16(1) and 16(2) of the HMA 1955. Doing so would not offend or breach the restriction which is specified in sub-section (3) of Section 16.

43. Sub-section (3) of Section 6 indicates by a deeming provision what would constitute the interest of a Hindu Mitakshara coparcener. As already discussed, the deeming fiction requires an assumption of a hypothetical state of affairs in terms of which a notional partition is deemed to have taken place immediately before the death of the Hindu Mitakshara coparcener. Now, let us assume for the sake of example that there are four coparceners- C1, C2, C3, and C4. C2 has died. C2 is survived by a widow, a son, and a daughter but it so transpires that one of the children is born from a marriage which is *null* and *void* under Section 11 of the HMA 1955. C2 would have a 1/4th share in the coparcenary which consisted of him and his three brothers' C1, C3 and C4. Now, in order to ascertain C2's share in the property and the devolution of this shares among C2's heirs, the Explanation mandates an assumption that a partition took place immediately before C2's death. In such a partition, between him and his brothers, C2 gets 1/4th share in the larger

coparcenary comprising himself and his 3 brothers. Now, within his own branch, C2, his widow and his child born from a valid marriage *would* each have a 1/3rd share. In other words, in the notional partition which is deemed to have taken place in terms of the Explanation the share of C2 is ascertained at 1/3rd. In working out the devolution of interest and the distribution of property following the death of C2, C2's 1/3rd share would be equally distributed between his widow, child born from the marriage which was valid and the child born from the marriage whose legitimacy is protected by Section 16(1) of the HMA 1955 though the marriage was *null* and *void.* In other words, such a child would have a share in the property which would be allotted to his parent (C2) if a partition had taken place immediately before the death of C2. The widow would take a 1/3rd share (her share in the notional partition) plus 1/3rd in the 1/3rd share of C2 (her share in succession, as an heir to C2). The child who was born from the valid marriage would acquire a 1/3rd share plus a 1/3rd share in C2's 1/3rd share. The child who has the benefit of Section 16(1) of the HMA 1955 acquires a 1/3rd share in the 1/3rd share which was allotted to C2 presuming that the partition had taken place immediately before the death of C2. This child, unlike the child born out of a lawful marriage, is not entitled to a share in the notional partition itself. After the father's share is determined in such notional partition, a child whose legitimacy is protected under Section 16(1) and 16(2) will have a share in the father's share, along with the surviving widow and the other children. This, in our view, would be the correct and proper interpretation of the Explanation to Section 6 which mandates the assumption of a notional state of affairs namely, a partition immediately before the death of the Hindu male coparcener.

PART H

44. It has been submitted before us that the child who is conferred with legitimacy under Sections 16(1) and Section 16(2), would not have a share in the partition of the 'larger coparcenary' but would have a share in the coparcenary that comprises of the child's father and the father's legitimate children. It has been urged that the latter coparcenary, this child would be at par with the other children of the father born out of a valid marriage, and that such parity of treatment for the purpose of coparcenary property is the purpose of the law[45].

We must clarify that it is true that the Hindu Law recognises a branch of the family as a subordinate corporate entity, within the fold of the larger coparcenary comprising many such branches. However, even such branches can acquire, hold and dispose of family property subject to certain limitations. The nature of property held by such a branch, until partitioned among the members of the branch does not cease to be that of a joint family property of all the coparceners of the branch. Now, since the child conferred with legitimacy under Section 16 is not a coparcener, the branch comprises the father and his children born out of the valid marriage. As such, the property, once partitioned from the larger coparcenary, and in the hands of the father, for his own branch, is not the father's separate property, until the partition happens within the branch. It continues to be the coparcenary property in which the children from his valid marriage have joint ownership. Thus, in view of the restriction in Section 16(3), in this property- not being the exclusive property of the father- a child covered by Section 16(1) and 16(2) is not entitled.[46]

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[45] Written Synopsis on behalf of appellant in Revanasiddappa & Anr. vs. Mallikarjun & Ors. by Kiran Suri, Sr. Advocate, page 4.

[46] Vineeta Sharma vs Rakesh Sharma (2020) 9 SCC 1, 39 (para 36) - *"In Bhagwan Dayal vs Reoti Devi, it was held that coparcenary is a creature of law and branch of the family was a subordinate corporate body and discussed the proposition thus: "47. …. Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. <u>The law also recognises a branch of the family</u>*

45. The above legal position is supported by a conjoint reading of Section 6, HSA and Section 16, HMA as well. It is important to notice that while Section 16(1) and Section 16(2) of the HMA confer legitimacy on children from *void* or voidable marriages, sub-section (3) has circumscribed the extent of the right to or in property that would be enjoyed by a person who has statutorily been conferred with legitimacy under sub-sections (1) and (2). Such an individual is not to possess any rights in or to the property of any person other than the parents. Hence, in working out the share of such an individual who is entitled to the benefit of the statutory conferment of legitimacy by the two sub-sections of Section 16, it is important to ascertain what exactly is the property of the parent which comes up for devolution by intestate succession under Section 6(3) of the HSA 1956. Where the parent is a Hindu Mitakshara coparcener, the Explanation mandates that his share in the property has to be ascertained on the basis of a notional partition having taken place immediately before his death. The share of the Hindu male coparcener which is ascertained on the basis of a notional partition immediately before his death would be distributed among his heirs in terms of Section 10 of the HSA 1956. The individual upon whom legitimacy has been conferred by Section 16(1) or Section 16(2) of the HMA 1955 would be entitled to a share in the property that would have been allotted to their parent assuming a notional partition immediately before the death of the parent. Such a construction would be in accordance with Section 6(3) and would harmonise it with the provisions of Section 16(3) of the HMA 1955.

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as a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family"..."

46. We must also take note of the fact that the HMA 1955 came into force with effect from 18 May 1955. Section 16 as it was originally enacted, dealt with the conferment of the legitimacy of children born from void or voidable marriages, as the case may be. The erstwhile provision had a proviso which circumscribed the extent of the right in property of a child born from such a marriage. The HSA 1956 came into effect on 17 June 1956. Section 6 as it originally stood was substituted by Act 39 of 2005 with effect from 9 September 2005. While Section 4 gives overriding effect to the Act, clause (b) of sub-section (1) indicates that this is with respect to any other law in force immediately before the commencement of the Act applicable to Hindus, insofar as it is inconsistent with any of the provisions of the HSA 1956. There is no inconsistency between Section 16(3) of the HMA 1955 and Section 6(3) of the HSA 1956 and both have to be harmonised in the manner which has been indicated above. When Section 6 was incorporated in the text of the HSA, 1956 as it was originally enacted, Parliament was aware of the pre-existing provisions of Section 16 of the HMA 1955. When Section 6 was substituted by Act 39 of 2005, Parliament was aware of the substitution of Section 16 of the HMA 1955 by Act 68 of 1976 with effect from 27 May 1976.

47. At this stage, it would be material to take notice of the provisions of Section 3(j) of the HSA 1956 which defines the expression ‘related’ in the following terms:

> "(j) "related" means related by legitimate kinship:
>
> PROVIDED that 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"

48. The proviso to Section 3(j) indicates that illegitimate children 'shall be deemed to be related to their mother and to one another'. This provision will not come in the way of an individual who is protected by Section 16(1) or (2) of the HMA 1955 in seeking a share in the estate of his or her parent in terms of Section 6(3) of the HSA in the manner which has been interpreted earlier in this judgment. Once legitimacy has been conferred upon such an individual under sub-section (1) or sub-section (2) of Section 16 of the HMA 1955, the proviso to Section 3(j) which deals with "illegitimate children'' ceases to apply to children covered under Section 16(1) and Section 16(2).

49. The *interplay* between the provisions of Section 16(3) of the HMA 1955 and Section 6 of the HSA 1956 has been elaborately discussed in an illuminating judgment of a Division Bench of the Bombay High Court in **Shantaram Tukaram Patil** v. **Dagubai Tukaram Patil**[47]. Justice R A Jahagirdar speaking for the Division Bench observed:

> "21…
>
> We have already held above that the legitimacy conferred by section 16 of the Hindu Marriage Act was there even prior to the 1976 amendment. Only it was extended to some more persons. The Hindu Succession Act is no doubt an Act which is later to the Hindu Marriage Act. One must proceed on the assumption that the Parliament was aware of the provisions contained in section 16 of the Hindu Marriage Act — an earlier law — and despite this it did not exclude the children who were made legitimate under section 16 of the Hindu Marriage Act from the class of legitimate heirs under the Hindu Succession Act. In fact one would assume that if the Parliament wanted to exclude the "legitimate children" of section 16 of the Hindu Marriage Act from the provisions of the Hindu Succession Act, it would have definitely provided for that effect. The legitimacy, therefore, created by section 16 of the Hindu

[47] 1987 SCC OnLine Bom 9: 1987 Mah LJ 179

> Marriage Act must be read into as a part of the definition in section 3(1)(j) of the Hindu Succession Act. It would be unreasonable to suppose that section 3(1)(j) would nullify the effect of a provision contained in an earlier Act when either by express words or by necessary implication it does not do so."

The Division Bench held that children born of a *void* marriage and who are regarded as legitimate by virtue of the provisions of Section 16 of the HMA are entitled to the rights conferred upon them by Section 16(3) "irrespective of the apparent restricted definition of Section 3(1)(j) of the Hindu Succession Act".

The Division Bench held that children of a *void* marriage have been given a right in the property of their parents:

> "24… 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 they 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."

I. Legitimacy and Coparcenary

50. As a matter of first principle, it is necessary to emphasize that while conferring legitimacy on children born from marriages that are *void* or, as the case may be, voidable under sub-section (1) and sub-section (2) of Section 16 of the HMA 1955, Parliament circumscribed the nature of the rights in property that such a child can seek. **Such an individual does not *ipso facto* become a coparcener in the Hindu Mitakshara Joint Family.** The basic principle which governs such an HUF is that a coparcener holds a property in common with others. The birth of

a person who is a coparcener leads to the acquisition of an interest in the coparcenary property. Shares are liable to increase with birth and reduce with the death of a coparcener. As a result of the substitution of Section 6(3), devolution of the share of a Hindu male coparcener in the property of a HUF governed by Mitakshara law upon death takes place not by survivorship but by testamentary or intestate succession, as the case may be, under the Act. Section 6(3) has therefore after its substitution provides for devolution by testamentary or intestate succession under the Act and not by survivorship. Section 6 however, continues to recognize the existence of Mitakshara Hindu Joint families.

51. Prior to the enactment of the HMA 1955, the Hindu law did not render a second marriage of a male Hindu during the subsistence of an earlier marriage *void*. A three judge Bench of this Court recognized the position prior to the enactment of the legislation in its decision in **Bhaurao Shankar Lokhande** Vs **State of Maharashtra**[48]. The Court noted that "there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the lifetime of his previous wife, *void*". On the enactment of the legislation, Section 5, while stipulating the conditions of a valid marriage came to provide that a marriage may be solemnized between any two Hindus if the conditions mentioned in the Section are fulfilled, one of them being that neither party has a spouse living at the time of the marriage. Section 17 stipulates that any marriage between two Hindus solemnized after the commencement of the Act is *void* if at the date of such marriage, either party has

[48] (1965) 2 SCR 837

a husband or wife living. As a result, the provisions of Sections 494 and 495 of the Penal Code dealing with the offence of bigamy are to apply. In the absence of a protective provision such as Section 16, upon the enactment of the HMA 1955, the personal law governing Hindus would be overridden to that extent by the statutory prohibition on contracting a second marriage during the subsistence of an earlier marriage. Section 4 conferred overriding force and effect on the provisions of the legislation. As a result of the statutory prohibition on bigamy, and the nullity of such marriages in the eyes of the law, a child born to parents in a *void* marriage was deprived of the legitimacy that they enjoyed under the traditional Hindu law.

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. Between 1956, when the HSA was enacted and 2005 when Section 6 came to be substituted, many State amendments conferred equal rights to daughters of coparceners by recognizing that they would become coparceners in their own right by birth and would have the same rights in the coparcenary property as were granted to sons. Parliament brought about uniformity by the Amending Act of 2005 by recognizing that the daughter of a coparcener would become a coparcener at birth in the same manner as a son and would have the same rights in the coparcenary property as if she has been a son while being subject to the same liability. The next major change which was brought about by the Amending Act of 2005 was that the devolution of the interest of a Hindu in an HUF governed by Mitakshara law would take place by testamentary or intestate succession and not by survivorship as was originally stipulated in Section 6 at the time of the enactment of the legislation. These statutory developments indicate that Parliament has recognized the existence of the institution of the Hindu Undivided Family governed by Mitakshara law, the concepts of a coparcenary, coparceners, and coparcenary property. As a statutory

measure to facilitate a more gender-equal society in recognition of the objects of Article 15 of the Constitution, Parliament has stepped in to provide rights to daughters by recognizing their position as coparceners so as to have rights in coparcenary property on an equal footing with sons. The amendments that have been made by Parliament have redefined the ambit of the coparcenary in a Hindu Undivided Family governed by Mitakshara law by specifically conferring rights upon daughters.

Section 6(1) which confers a right on the daughter of a coparcener to become a coparcener by birth in her own right and in the same manner as the son and to have the same rights in the coparcenary property provides abundant statutory material to indicate that the legislature did not abolish the basic concepts of a HUF, coparcenary, and coparcenary property. The legislature brought about a significant reform by recognising the rights of daughters to become coparceners at par with sons. Prior to the amendment, a son would become a coparcener by birth but after the amendment, the right of a daughter to become a coparcener by birth has been recognised. The acquisition of a right by birth both of a son and daughter which finds statutory recognition in sub-section (1) of Section 6 is clearly demonstrative of the fact that the legislature, while accepting the concept of a coparcener has brought about a significant measure of reform.

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.

J. The referring judgment revisited

52. The two Judge Bench of this Court in its referring judgment has observed that:

(i) The decision in **Jinia Keotin** (which has been followed in **Neelamma**) and later in **Bharatha Matha** has taken a narrow view of Section 16(3) of the HMA 1955;

(ii) The legislature has used the expression "property" in Section 16(3) but is silent on whether such property is meant to be ancestral or self-acquired;

(iii) Section 16 contains an express mandate that such children are only entitled to the property of their parents and not of any other relation;

(iv) Children who are declared to be legitimate under sub-section (1) or sub-section (2) of Section 16 "cannot be discriminated against and they will be on a par with other legitimate children" and are entitled to all the rights in the property of their parents both self-acquired and ancestral;

(v) The prohibition in Section 16(3) will apply to such children with respect to property of any person other than the parents;

(vi) With changing social norms what was illegitimate in the past may be legitimate today and Hindu law itself has not remained static with changes in society;

(vii) The HMA 1955 is a beneficent legislation intended to bring about social reforms and hence the interpretation of Section 16(3) needs to be reconsidered;

(viii) Amended Section 16 alters the common law position that a child of a marriage which is *void* or voidable is illegitimate *ipso jure* but that benefit is available only when there is a marriage and the marriage is *void* or voidable in view of the HMA 1955;

(ix) In the case of joint family property such children would be entitled to a share only in the property of their parents but cannot claim it in their own right. On the partition of ancestral property, the property falling to the

share of the parents of such children is regarded as their self-acquired and absolute property, and there is no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of a valid marriage. However, the only limitation is that during the lifetime of their parents such children cannot ask for partition but they can exercise this right only after the death of the parent;

(x) The interpretation of the Court must be guided by the constitutional principle of individual dignity. Hence, though, the relationship between the parents may not be sanctioned by law but the birth of a child in such a relationship must be viewed independently. However, there still exists some limitation of the property rights of the children in that their right is confined to the property of their parents; and

(xi) Section 16(3), as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents and hence such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral.

53. There is a degree of contradiction in the referring judgment which needs to be clarified and set at rest at this stage. The two judge Bench has, on the one hand, specifically noted that "the prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents".[49] The Court has also noted that "in the case of joint family property such children will be

[49] Revanasiddappa v. Mallik Arjun, (2011) 11 SCC 1

entitled only to a share in their parents'[50] property but they cannot claim it on their right". The Court then holds that logically on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property and there is no reason why such children will have no share in such property since they are equated under the law with legitimate off-spring. At the same time, during the life-time of the parents, such a child cannot seek partition. Moreover, the right is confined to the property of their parents. From the above observations it appears that the Court has recognised that while conferring legitimacy in terms of sub-section (1) or sub-section (2) of Section 16 to children born from *void* or voidable marriages, Parliament has circumscribed the entitlement to the property of such children by observing that nothing contained in those provisions shall be construed as conferring a right in or to the property of any person other than the parents. Having noticed this, the Court has also observed that in the case of joint family property such children will be entitled only to a share in their parent's property but cannot claim it of their own right as a consequence of which they cannot seek partition during the life-time of their parents. However, the Court has also observed that once such children are declared as legitimate, they will be at par with other legitimate children. The observation in paragraph 29 of the referring judgment that a child who is conferred with legitimacy under sub-section (1) and sub-section (2) of Section 16 will be on par with other legitimate children is in the context of recognising the entitlements of such a child in the property of their parents and not *qua* the property of a third person. The rationale in the referring order cannot be held as treating individuals who have been conferred with

[50] Para 38 page 11

legitimacy in terms of either of the two sub-sections of Section 16 to be entitled to full rights in property at par with children who are born from a valid marriage. Section 16(3) has expressly stipulated that the rights of such a child who is conferred with legitimacy by sub-section (1) or sub-section (2) of Section 16 would be in respect of the property of the parents and not of any other person.

K. Conclusion

54. We now formulate our conclusions in the following terms:

(i) In terms of sub-section (1) of Section 16, a child of a marriage which is *null* and *void* under Section 11 is statutorily conferred with legitimacy irrespective of whether (i) such a child is born before or after the commencement of Amending Act 1976; (ii) a decree of nullity is granted in respect of that marriage under the Act and the marriage is held to be *void* otherwise than on a petition under the enactment;

(ii) In terms of sub-section (2) of Section 16 where a voidable marriage has been annulled by a decree of nullity under Section 12, a child 'begotten or conceived' before the decree has been made, is deemed to be their legitimate child notwithstanding the decree, if the child would have been legitimate to the parties to the marriage if a decree of dissolution had been passed instead of a decree of nullity;

(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;

(iv) 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;

(v) Section 6 of the HSA 1956 continues to recognize the institution of a joint Hindu family governed by the Mitakshara law and the concepts of a coparcener, the acquisition of an interest as a coparcener by birth and rights in coparcenary property. By the substitution of Section 6, equal rights have been granted to daughters, in the same manner as sons as indicated by sub-section (1) of Section 6;

(vi) Section 6 of the HSA 1956 provides for the devolution of interest in coparcenary property. Prior to the substitution of Section 6 with effect from 9 September 2005 by the Amending Act of 2005, Section 6 stipulated the devolution of interest in a Mitakshara coparcenary property of a male Hindu by survivorship on the surviving members of the coparcenary. The exception

to devolution by survivorship was where the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative in Class I claiming through a female relative, in which event the interest of the deceased in a Mitakshara coparcenary property would devolve by testamentary or intestate succession and not by survivorship. In terms of sub-section (3) of Section 6 as amended, on a Hindu dying after the commencement of the Amending Act of 2005 his interest in the property of a Joint Hindu family governed by the Mitakshara law will devolve by testamentary or intestate succession, as the case may be, under the enactment and not by survivorship. As a consequence of the substitution of Section 6, the rule of devolution by testamentary or intestate succession of the interest of a deceased Hindu in the property of a Joint Hindu family governed by Mitakshara law has been made the norm;

(vii) Section 8 of the HSA 1956 provides general rules of succession for the devolution of the property of a male Hindu dying intestate. Section 10 provides for the distribution of the property among heirs of Class I of the Schedule. Section 15 stipulates the general rules of succession in the case of female Hindus dying intestate. Section 16 provides for the order of succession and the distribution among heirs of a female Hindu;

(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; and

(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.

55. Before concluding, it would be necessary to clarify that the reference to the three Judge Bench in this batch of cases is confined to Joint Hindu families governed by Mitakshara law. This Court has, therefore, dwelt on the interpretation of the provisions of the HSA 1956 in relation to Joint Hindu families of that class.

56. The reference shall stand answered in the above terms.

57. The proceedings in the individual cases shall now be listed immediately before a two Judge Bench in accordance with the assignment of work for disposal.

58. A large number of cases are likely to have remained pending before each High Court due to the pendency of this reference to the three judge Bench. The Registrar (Judicial) of this court is directed to immediately circulate a copy of the Judgment to the Registrars (Judicial) of all the High Courts who shall upon taking suitable directions from the Chief Justices on the administrative side ensure that all pending cases involving the issues decided here are listed for hearing and disposal before the assigned benches according to the rosters of work.

59. We express our appreciation of the able assistance rendered to this Court by all the Counsel who appeared in the batch of cases: Ms Kiran Suri, Senior Advocate, Mr A I S Cheema, Senior Advocate, Mr Sudhanshu S Choudhari, Dr Ravindra Chingale, Mr Nikhil Majithia, Counsel; Mr K Radhakrishnan, Ms V Mohana, Senior Advocate, Mr Vivek Chib, Senior Advocate, Mr Shirish K Deshpande, Mr Samrat Krishnarao Shinde, Mr P B Suresh, Mr Nishant

Ramakantrao Katneshwarkar, Mr Mukesh K Giri, Mr V Prabhakar, and Mr Vivek Solshe, Counsel.

…….CJI
[Dhananjaya Y Chandrachud]

..……J
[J B Pardiwala]

..……J
[Manoj Misra]

New Delhi;
September 01, 2023.