FIRST APPEAL NO.835 OF 1996
AND
FIRST APPEAL NO.1057 OF 1996

Date of decision: April 30,1996

For Approval and Signature:

The Hon'ble Mr.Justice N.J.Pandya

The Hon'ble Mr.Justice A.R.Dave

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to t..

India,1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

First Appeal No.835 of 1996

Mr.B.R.Shah, Ld.Sr.Counsel with L.As. Mr.Akshay H.Mehta & Mr.B.M.Gupta for the appellant.

Mr.A.H.Mehta, L.A. with Mr.B.H.Chhatrapati for respondent no.1
Mr.H.V.Chhatrapati for respondents 2,10 & 11.
Mr.S.N.Shelat, Addl.Advocate General with Mr.C.H.Vora for Respondents 3 and 6 to 9.
Mr.S.B.Vakil, ld. Counsel for Mr.C.H.Vora for respondents 4 & 5.
Mr.S.B.Vakil, ld.Counsel for respondents 12 & 13.

First Appeal No.1057 of 1996

Mr.A.H.Mehta, L.A. with Mr.B.H.Chhatrapati, L.A. for the appellant.

Mr.H.V.Chhatrapati, L.A. for Respondents 2,10, & 11
Mr.S.N.Shelat, Addl.Adv.General with Mr.C.H.Vora, L.A. for respondents 3 and 6 to 9.

Mr.S.B.Vakil, ld.Counsel with Mr.C.H.Vora, L.A. for respondents 4 & 5

Mr.S.B.Vakil, ld. Counsel for respondents 1,2 and 13.

Mr.B.R.Shah, ld.Counsel with Mr.Akshay H.Mehta & B.M.Gupta, L.As. for respondent no.1.

Coram: N.J.Pandya & A.R.Dave,JJ.
April 30, 1996

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C.A.V. JUDGMENT (Per N.J.Pandya,J.)

These two matters arise out of an order that came to be passed below Exh.186 in Special Civil Suit No.68 of 1980 on 18th January 1996 by the learned Civil Judge (SD) Kutch at Bhuj. By the said order the plaint said Special Civil Suit No.68 of 1980 came to be rejected under the provisions of Order VII Rule 11 of the Code of Civil Procedure 1908.

2. The said suit was filed by the appellant of First Appeal No.835 of 1996. The appellants of the other appeal are defendants of the said suit and they are also joined as respondents in the said appeal filed by the original plaintiff. This being the position, both the appeals are taken up for hearing and disposal together treating First Appeal No.835 of 1996 to be the main matter. As a result, the position of the respective parties in respect of the said litigation will be referred to in the manner that appears in the said main appeal.

3. The suit came to be filed on 26-12-1980 when father of the appellant-original plaintiff (hereinafter referred to as the appellant) was very much alive. No.2

happens to be the mother of the appellant, Nos. 3 & 4 are his brothers, while nos.5 & 6 are sons of original defendant no.4. Sisters also came to be joined along with other related family members required to be joined as party in a suit for partition.

4. The partition was sought in respect of what the plaintiff described to be Joint Hindu Family Property and therefore, in the prayer clause contained in para 23, various reliefs in relation to both moveable and immoveable properties were prayed for with a further prayer that the appellant be given his 1/3rd share which would be separated by metes and bounds. There were other ancillary reliefs also.

5. Had it been a case of any other Joint Hindu Family, the matter would have proceeded before the trial Court in the usual manner and there would have been a judgment and decree either allowing the suit or dismissing the same.

6. That position is to be found in the instant matter also to the extent of bringing the suit before the trial Court to the stage of recording evidence.

7. At that stage, however, application Exh.186 came to be given by the defendants 4 to 6 under Order VII Rule 11 of the Code of Civil Procedure 1908 praying for the rejection of the plaint on the ground that the plaint, as filed, is barred bylaw and does not disclose any cause of action.

8. The essential and material difference between an ordinary plaintiff and the appellant as a plaintiff before the trial Court asking for separation of his share in the Joint Hindu Family is only one namely that original defendant no.1, his father, happened to be the Ruler of the State of Kutch admittedly a sovereign native State when India was a colony of the United Kingdom. It was the said defendant no.1, since deceased, who ceded the State to the dominion of India by a Covenant dated 4-5-1948. The said defendant no.1 was also recognised as a Ruler of the State pursuant to the said Covenant for the purpose of payment of privy purses and other privileges. This continued to be the position till the 26th Amendment to the Constitution of India in the year 1971. As noted above, the suit came to be filed almost 9 years thereafter i.e. on 26th December 1980.

9. Application Exh.186 came to be filed mainly on the basis that defendant no.1 being a Sovereign on account of

the merger, whatever properety he got, he received it as an erstwhile Ruler of the State and therefore, it would be his exclusive property. There is also a hint to the effect that in the Sovereign State there was a Rule of primogenitor applicable and effect thereto may have to be given when question of succession to defendant no.1 would arise. The legislative event, in the meantime, i.e. between the said date of merger and the date of filing of the suit, if are taken into consideration, the first and foremost is the adoption of the Constitution of India on and from 26th January 1950, Hindu Succession Act, 1956 and the 26th Amendment to the Constitution in the year 1971. The learned trial Judge was required to deal with Exh.186, as presented before him and therefore, he did refer to its contents and also for the reasons recorded in his order, he found that the contention of Exh.186 is well founded and therefore, he passed the aforesaid order rejecting the plaint.

10. However, before the trial Court as well as before us, there is an agreement as to one aspect namely that if the plaint is to be evaluated pursuant to order VII rule 11 particularly with reference to the contention raised namely that it is barred by law and that it does not disclose any cause of action, the plaint, as it was filed before the trial Court, alone has to be seen. This would necessarily include the documents which are referred to in the plaint and particularly those that came to be filed along with the plaint and were to be relied upon by the plaintiff for the purpose.

11. The documents are numerous and more particularly the said agreement of merger dated 4-5-1948, followed by a letter of that very date addressed to said defendant no.1 by Secretary to the Government of India Shri V.P. Menon.

12. The said agreement required the Kutch Maharao to state what he chose to declare to be his private properties. This was pursuant to Article 4 of the said Merger Agreement mark 3/1 before the trial Court. The letter mark 3/2 recognised his choice as declared by said defendant no.1 to the Government of India. Needless to say these properties are also shown in the plaint to be the properties among others (immoveable properties) wherein the plaintiff is seeking his 1/3rd share. As noted above, there is no dispute that the plaint alone with the documents referred to in it are to be seen for deciding whether it can be rejected under O.VII rule 11 or not. Both the sides therefore, referred to the plaint extensively and it has been read more than once.

13. In the plaint, para 1, the plaintiff i.e. the appellant describes himself to be the eldest Son of defendants no.1 & 2 and thereafter relationship with rest of the defendants is set out and thereafter, assertion is made that they are all Hindus governed by Mitakshara School of Law. The appellant thereafter, described himself to be the Karta of his Branch of the Joint Family and states that he is filing the suit for himself and also as the said Karta. Likewise, others are also described in their respective different capacities in relation to their respective families as well as their joint Hindu Family which is said to be owning the properties referred to hereafter.

14. In para 2 assertion is to be found that prior to February 1948 Kutch State was ruled by His Highness the Maharao Vijayrajji, the father of the first defendant. He died in or about February 1948. The material assertion is that prior to and at the time of his death, the said Maharao was the karta of Joint Undivided Hindu Family referred to as Joint Family. The said joint family consisted of the said Maharao Vijayrajji, his wife Maharani Padamkumverba, since deceased, his eldest Son Yuvraj Madansinhji (the first defendant) , Yuvrani Rajendrakunverba (the wife of Madansinhji and the 2nd defendant) and so on. At the end of the said paragraph, assertion is made that said joint family was governed by Mitakshara School of Law and the family held various immoveable and moveable properties within and outside the said State of Kutch.

15. On demise of Maharao Vijayrajji, defendant no.1 being the eldest Son, according to the appellant, became the Karta of said Joint Family and as such, he gained control over and charge of the various immoveable and moveable properties belonging to the joint family. In short, on death of Maharao Vijayrajji, late defendant no.1 became Ruler and the Maharao of Kutch. Soon followed the event of merger on 4-5-1948 and from 1st of June 1948 Sovereignty of said Maharao, late defendant no.1, over Kutch State came to be ceded to the Dominion of India which became finally the Government of India or Union of India.

16. In para 4 of the plaint, with reference to said event of merger and particularly the said merger agreement clause 4 and subsequent clauses, interpretation by the appellant put thereon is that the properties referred to as private properties are distinct from the State properties held by defendant no.1 as Karta of the Joint Family. The interpretation put was that under the

said agreement, the first defendant became entitled to receive an annual sum of Rs.8 lakhs as privy purse which amount was intended to cover all the expenses of the 1st defendant and his family. The cases with regard to the said properties as well as the privy purse etc. is further elaborated upon in para 5 of the plaint where various properties are mentioned both moveable and immoveable. That is the position again in paragraphs 6,7,8,9,10 & 11.

17. In para 12 assertion is made that late defendant no.1 never had any independent source of income other than the income earned and/or derived by the use of the joint family funds referred to in the plaint in earlier paragraphs and investment made thereof by defendant no.1.

18. In para 13, assertion is made that privy purse was received by defendant no.1 till its abolition as Karta of said Joint Family and for interpretation, reference is made to Merger Agreement dated 4-5-1948.

19. The 1971 event of abolition of Privy Purse on account of 26th Constitutional Amendment is referred to in para 14 and a claim is putforth that whatever compensation that the late Ruler would have on account of the abolition of privy purse, the appellant does have a right therein but under O.II r.2, he reserves the same and craves leave for the purpose from the Court.

20. In para 15 there is a reference to separation of the branch of 3rd defendant by a deed which is referred to as partial partition by the appellant in para 16 of the plaint. Likewise, an event in respect of the original defendant no.4 is also referred to by the appellant as an event of separation. Reference to which is to be found in paragraphs 15 & 16. In respect of both these events referred to as partial partition by the appellant documents are relied upon. These writings are dated 30th August 1967 and 24th December 1975.

21. The appellant, thereafter, asserts in para 17 that he has been occupying a joint family property known as "Ranjit Villa" in Bhuj and that in lieu of his maintaining his grand-mother, he was reimbursed by late defendant no.1. He further asserts that prior to 1976 late defendant no.1 used to pay to the appellant an annual sum of Rs.1,26,000/- for the upkeep and maintenance of said Ranjit Villa. This was being paid from the joint family funds and income according to the appellant. For the years 1976 and 1977 this amount came to be reduced to Rs.1,00,000/-. From the year 1978 late

defendant no.1 stopped paying the appellant any amount. Therefore, the plaintiff has putforth a claim of the amount that he has spent in maintenance of the property known as "Ranjit Villa". He has specified the sum also for the purpose. For future also, he has asked an amount towards the same as set out in paragraph 18 of the plaint.

22. Summarising his case in para 19 of the plaint, the appellant asserts that the properties specified in paragraphs 5,7,9 and 11 belong to the said joint family comprising the plaintiff-appellant and his branch, defendants 1 & 2 and as such, according to him, he called upon defendant no.1 to partition the property on 3-4-1980. This having not been done he filed the suit.

23. In para 20, he challenges some of the transactions what he called to be unauthorised alienations which are set out more particularly in paragraph 21 of the plaint. Similar averments are to be found in para 22 and in para 23, the appellant has referred to the liability of defendant no.1 as karta of the family to render accounts. In para 25, there is a reference to properties other than the one mentioned so far in the plaint, which according to the appellant, to the best of his knowledge and awareness, do exist for which he is seeking the help of the Court whereby late defendant no.1 could have been compelled to disclose the same.

24. In para 26, the appellant asserts his 1/3rd share and claims that 1/3rd of the property or its monetary equivalent be made over to him after the Commissioner of Taking accounts or some other fit and proper person appointed by the Court for the purpose has submitted the report.

25. In para 27 of the plaint, the consequence of unauthorised alienation is adverted to and setting aside thereof has been asked for. In para 28, grounds for appointment of Receiver is sought to be made out and consequential prayer is also made in that paragraph. Paragraph 30 refers to the cause of action, para 31 refers to court fees, 32 refers to law of limitation and para 33 contains the prayer.

26. This is the brief summary of the plaint which is required to be now evaluated under the provisions of Order VII Rule 11 of the Code. Of the grounds mentioned therein two are pressed into service by said defendants who submitted application Exh.186. As mentioned earlier,

these grounds are (1) the plaint is barred by law; (2) it does not disclose cause of action. As mentioned earlier had it been a simple case of joint Hindu family other than involving what was till 1948 a ruling family, probably application Exh.186 would not have been filed. The aspect of sovereignty, rule of primogenitor, its effect, impartibility of a sovereign estate and the effect of merger on it, are the questions that have been urged before the trial Court and needless to say , they are pressed into service before us also.

27. On behalf of the appellant, concentration essentially has been on Order VII Rule 11 of the Code and therefore, with reference to that ILR 1940 598 & AIR 1996 Delhi 14, have been cited. The first of the said two decisions lays down that the facts stated in the plaint should be taken on demurrer and the plaint should be evaluated modo et forma. When an objection under O.VII R.11 or provisions similar to it as was pressed into service in the said Calcutta decision under the old Code of Civil Procedure, is to be considered, the defendant raising the plea can do so only on accepting the truth of the plaint for the sake of argument and for that purpose, has to take the plaint as it is.

28. The implication is that the challenge to the plaint and its affirmation by the defendant, who contests the claim, is to be kept apart because that would be a case putforth by a contesting defendant in his defence. In other words, what can be a defence to the plaint cannot be taken into consideration for deciding whether the plaint should be rejected or not under O.VII Rule 11. This position is accepted by the other side.

29. The Delhi decision is also on the aspect that merely because partition is claimed in respect of a joint property of the Ruler, it cannot be rejected only on that count.

30. The learned single Judge of Delhi High Court was dealing with a matter involving Jaipur Estate, where the private properties were declared as HUF properties in Income-Tax Returns and Wealth Tax Returns.

31. Now comes the question of property of a sovereign State held by a person after the merger especially when the person so holding was himself a Ruler till the merger. For this AIR 1982 SC 887, 137 ITR 77, AIR 1970 SC 1946 have been relied upon.

32. The first of the three authorities lays down that

mere fact that Estate is impartible would not make it exclusive property of the holder. The second decision refers to the effect of Hindu Succession Act 1956 which strictly speaking in the instant case would not be applicable as at the time of filing of the suit, defendant no.1 was alive. He died on 21-6-1991 almost after 10 years of the filing of the suit. However, the relevance is in respect of clause 5(2) as it takes care of the rule of primogeniture.

33. In anticipation of what the other side would say as to the effect of merger, recognisation as a Ruler under Article 291 read with Articles 326,363 and 372, the appellant and his supporting respondents are relying on AIR 1970 SC. 1946, AIR 1971 SC 530, and 1994 Sup.1 SCC 734.

34. The attempt on the part of the appellant by citing these authorities is to show that on and after 1971, when the 26th Amendment came to be passed, the erstwhile Rulers ceased to have any privileges and special rights. If at all they had any, they were completely abolished and they became ordinary citizens like rest of us. This seems to be the position on and after 1971. It may be remembered that the suit was filed in the year 1980.

35. The aforesaid authorities ordinarily would not have been cited by the appellant but for the fact that much has been made of the said rulership, merger covenant and the impact of defendant no.1 being sovereign till the merger.

36. As expected, several decisions have been cited on behalf of the contesting respondents. Mr.S.B.Vakil, L.A. appearing for them has cited 1994 Sup.1 SCC 734 on the point that in case of sovereign, impartibility of the estate is to be presumed. 9 GLR 609, 1993 Sup.1 SCC 233(279) 1994 Sup.1 SCC 734 (749), 1990 Sup. SCC 43 are with regard to succession to impartible estate and except for right of survivorship no other rights are recognised in favour of members of a joint family so far as sovereign estate are concerned and succession is under the operation of rule of primogenitor.

37. Sovereign estate is not considered to be a coparcenary property for which AIR 1943 PC 196 is relied upon. Decision of 15 Indian Appeals page 51 is also relied upon in support of the submission that no one can claim right of partition in respect of sovereign estate or property of the King or Ruler. Likewise, a junior

member of the family has no right to an impartible estate. Relying upon the said Privy Council decision, and AIR 1970 SC 1795 and 1993 Supp.1 SCC 32, it has been submitted that a junior member of the family has no right by birth in respect of an impartible estate except for a survivorship.

38. A holder of an impartible estate may transfer the estate inter-vivos, as per AIR 1988 SC 247. When Jagirs themselves were in the nature of impartible estate, compensation received in lieu of its abolition is also held to be impartible as per AIR 1991 SC 1972.

39. The aforesaid characteristic of impartible estate as to survivorship is to be found from AIR 1932 PC 216, also reported in AIR 1943 PC 196 referred to earlier and AIR 1964 SC 118.

40. The peculiarity of the aforesaid decisions is that the learned Judge whether of the High Courts, Supreme Court or that of the Privy Council all had an occasion to decide the matter after it or them was tried by the Courts below, that is to say, the matters before the learned Judges were decided on the basis of record which included oral and documentary evidence as relied upon by the respective parties before the Court of first instance. Same applies to judgments in Writ Petitions. They are decided on the basis of affidavits, counter record etc. The finding in each one of the decisions referred to above is clearly based on the facts revealed from the record and the facts that were pleaded and held to have been established one way or the other. The result, therefore, is that the aforesaid decisions, no doubt, have laid down the aforesaid different propositions but they are essentially based upon the facts and material as brought on record by way of evidence. Clearly, they admit of a possibility of proof of custom to the contrary. At the stage when the plaint is being considered for being rejected either as barred by law or as not disclosing any cause of action, the aforesaid decisions, in our opinion, would not help the contesting respondents at all.

41. The brief resume of the plaint given clearly indicates that it refers to a claim over a joint family property. If the appellant succeeds in making out his claim, he will get his share, else he would fail, but that would be on merits. Merely because he happens to be a member of the ruling family right from the date of his birth i.e. in the year 1936 or thereabout, it cannot be said that the plaint filed in the year 1980 is barred by

law.

42. No attempt was made before us to make out a case that because there are Supreme Court pronouncements pressed into service, on behalf of the respondents, by virtue of Article 141, they should be taken as law. In the background of the aforesaid controversy that could not have been raised and as noted above, it has not been raised either. Pronouncements of the higher forum or of the same jurisdiction that would happen to exercise, in our opinion being given in the matters that were finally decided by the Court of the first instance and therefore, were being dealt with by way of appeals whether first or second, they would be of no help whatsoever in dealing with the plaint under O.VII R.11.

43. Unfortunately, before the trial Court an attempt was made to make out a case of an act of State and therefore, the Civil Court not having jurisdiction. This would be in the nature of the same ground namely plaint being barred by law. For this purpose AIR 1924 PC 216, 1963 BLR 442, AIR 1962 SC 445, AIR 1964 SC 1043, 1971 SC 744 and 1981 SC 1946 were relied upon. These authorities cover a vide range of set of facts. A Sovereign Ruler may have gifted away the property before merger or where two high contracting parties namely a victor sovereign States imposing its Will upon the Vanguished Sovereign State may or may not recognise rights, claims and privileges conquered by the vanguished State and therefore, a subject of the Vanguished State cannot agitate his claim based thereon in a Court of the Victor State. The Court of the Victor State would be Municipal Court falling short of jurisdiction to adjudicate upon an act of the State of which the Court itself is a creature . Obviously, this is not the situation here. These authorities are referred to because they were cited. One more such decision is 1990 Sup.1 SCC 43.

44. Hindu Succession Act and its provisions have been referred to earlier. In that connection AIR 1981 SC 1946 was cited. But as mentioned above, the question of application of Hindu Succession Act to the plaint on the date of its filing would not arise because defendant no.1 was alive.

45. On behalf of the contesting defendants, AIR 1995 SC 895 was cited, but that is not applicable to the present case as it relates to proof of impartible estate ceasing to be joint. This matter is also an appeal after a regular trial.

46. On behalf of some of the contesting defendants, L.A. Mr.S.N.Shelat had cited 1990(2) GLH 219. It is under O.VII R.11. The Honourable Supreme Court, while dealing with an appeal on grant of special leave had an occasion to exercise power under O.VII R.11. The appellant before the learned Judges had lost surety. However, the peculiar facts would reveal that the respondents before the Honourable Supreme Court had on earlier occasion agitated the same question in an earlier litigation started in the year 1955 as Civil Suit No.19A of 1955 at Nagpur. That matter came to be settled and the settlement was acted upon. One of the agreed terms of the settlement was that amount was to be paid to the defendants of that suit and against that payment and other details of the settlement, the plaintiff would be entitled to a cinema theatre referred to as talkies.

47. Inspite of the acting upon of the said compromise between 5-3-1956 and 3-4-1956 a question was sought to be agitated by first first appeal and carrying the matter to the High Court by way of second appeal.

48. The said second appeal was dismissed on 2-12-1972 and the final decree of the said suit of the year 1955 which was drawn on 16-11-1959 was fully satisfied because after the dismissal of the second appeal no.293 of 1963 in the High Court no challenge to the same was posed by carrying the matter to the Supreme Court.

49. After a gap of almost 8 years, Civil Suit No.1699 of 1980 came to be filed in the Court of Civil Judge (SD) Nagpur assailing the above consent decree. Dealing with a matter of this nature, the learned Judges of the Supreme Court expressed themselves in no uncertain terms as to the applicability of Order VII Rule 11 because it did not disclose any cause of action. The cause of action if any, had come to an end by the said compromise and therefore, rejecting the plea of resjudicata adverting to order 23 Rule 3A and other provisions of the Code, the learned Judges held that the final decree based on compromise not shown to have been challenged from the plaint on the ground of fraud etc. it did not disclose any cause of action. Moreover, as noted, it was found that the benefit under the compromise was fully availed of by the original contesting defendants who have now become the plaintiff in the year 1980. In our opinion, therefore, this would be a case as rightly described by L.A. Mr.B.R.Shah appearing for the appellant, of text book example of abuse of process of law and a plain design to prosecute a vexatious proceeding not disclosing any cause of action.

50. In this background, if we evaluate the plaint of the present case, at several places it refers to the property being joint Hindu Family Property. The suit having been filed in the year 1980, the effect of the abolition brought about by 26th Constitutional Amendment has to be considered and the property like Ranjit Villa and others though may have been referred to in the said document mark 3/2 following the merger agreement mark 3/1 having been occupied by the plaintiff and in respect of which maintenance amounts having been paid etc. has to be given its due weightage. We agree with Senior Advocate Mr.Shelat that cause of action which has not been defined anywhere in the Civil Procedure Code can in a given case like said 1990 JT Vol.II 368 decision, include the concept of triable issue and therefore, the plaint may have to be evaluated on that basis and therefore, applying that test, we have no hesitation in holding that in the plaint before us there is a triable issue. The issue essentially relates to jointness or otherwise of the suit property.

51. Incidentally, it may be mentioned that properties are not only the one referred to in mark 3/2. The plaint refers to properties other than that, the details of which we are not required to go into at this stage. However, even if that be not so, the aforesaid 1996 Delhi Decision given in Jaipur Case and the 1993 Sup.1 SCC 233 in respect of Travancore Cochin Tarawad matter, do indicate that there might be a position--in respect of sovereign Rule also that he could be holding for and on behalf of the Joint Hindu Family a property over and above the property of a sovereign and in case of former, there could be a claim for partition. This decision was sought to be relied upon by the contesting respondents for their own purpose and at the same time, a distinction was sought to be made in respect of some of the observation of Justice Ranganathan. This is a 3 Judges decision given by the bench consisting of Honourable Judges Ojha, Ranganathan, and Fatimabibi.The main judgment is that of Justice Ojha. Justice Ranganathan while comparing with Justice Ojha has set out his own reasons. However, all the three Judges have given a unanimous decision that there were joint properties of 4 Marumakatayam Tarawad managed by ex Ruler as its Karanavan.

52. L.A. Mr.S.B.Vakil appearing for some of the contesting respondents had cited AIR 1977 SC 1421 which is to the effect that the plaint should be read meaningfully and had also relied on AIR 1991 SC 409 to

make out a case that only the plaint is to be looked at while passing the order. In our opinion, that is exactly what we have done. Reading the plaint meaningfully, in our opinion, it cannot be said either that it is barred by law or that it does not disclose any cause of action. A point was sought to be made out by L.A. Mr.S.B.Vakil that there is distinction between HUF and coparcenary and for that he had relied on AIR 1937 PC 37, AIR 1970 SC 14 and AIR 1943 PC 196. Elaborating his arguments further, L.A. Mr.Vakil had submitted that a person can be a member of a coparcenary only by birth, adoption or reunion. For this he had relied on AIR 1962 SC 287, AIR 1969 SC 1330. These submissions were made on the basis that in the plaint nowhere word "coparcenary" is to be found.

53. Elaborating further his argument, L.A. Mr.Vakil had submitted that at the time of the birth, the plaintiff was a member of what was admittedly a sovereign ruling family and when his father-defendant no.1 succeeded the then Ruler Maharao Vijayjirao, obviously, there was no question of coparcenary. The suit is filed during the life time of defendant no.1 and till his death when succession has not opened, according to L.A.Mr. Vakil how could the plaintiff have claim in the property and what is the basis? In our opinion, necessarily this and other issues raised on the basis of sovereignty that defendant no.1 enjoyed impartibility of the estate, there being coparcenary, no joint family property at all etc. can indeed be a good defence and may be in the background of the family being the one of a sovereign ruler there might be a presumption operating against the plaintiff-appellant. However, we agree with Sr.Advocate Mr.B.R.Shah and Advocate Mr.A.H. Mehta appearing for the respective appellants that this presumption is not absolute. Presumption is definitely rebuttable and this can be taken care of by raising appropriate issue and casting burden on the party required to rebut the presumption, if any.

54. The plaint, when meaningfully read, as per AIR 1977 SC 1421 decision cited by Mr.Vakil, in our opinion, it does disclose a cause of action. It cannot be said to be barred by law because the decisions of the Honourable Supreme Court and other higher forums including the decisions of other High Courts are based entirely on the facts and circumstances as brought on record in the respective litigations which would certainly the position in the instant case also provided it is allowed to be tried and the evidence thus brought on record is evaluated on relevant decisions being applied thereto.

55. The plaint, as filed, in our opinion, cannot be said to be suffering from any of the vices as sought to be made out in application Exh.186.

56. Before parting with the matter, we would like to make it clear that though the matter was argued at length and reference was made to some of the documents referred to in the plaint over and above marks3/1 and 3/2, as also various authorities were read at length, we have refrained from discussing them in detail because we are conscious of the fact that in view of our aforesaid conclusion the matter will go back to the trial Court at the stage where it was. Any observation made by us in respect of these documents and decisions particularly with reference to the plaint, is likely to create complication for the trial Court as an opinion having been expressed by an High Court to which the trial Court is subordinate. We have concentrated on the plaint as it is and with reference to the applicability of the law as to operation of order VII Rule 11, we have given this decision. Various decisions cited of the Supreme Court as well as Privy Council with regard to sovereign estate, impartibility of the estate, rule of primogeniture etc. in our opinion, are not required to be gone into elaborately at this stage, because for taking a decision, facts putforth by the other side will also have to be brought on record and law applicable to these facts on being applied with reference ofcourse to the relevant judicial pronouncements, the case will have to be decided.

57. If anything in the decisions cited at the bar, particularly on behalf of the plaintiffs-respondents, there is a clear pointer that the least a claim of partition of joint family property including sovereign impartible estate, deserves is a fulfledged trial. This would necessarily mean that the plaint, as filed, discloses a cause of action. It is not barred by any law. Rejection of plaint, under Order VII, Rule 11 of the Code is, therefore, unwarranted.

58. The net result, therefore, is that the appeals are allowed. The Order rejecting the plaint passed on 18th January 1996 is hereby set aside. The trial Court shall proceed to deal with the suit from the stage where it was in accordance with law. Looking to the near relations of the parties, they are left to bear their own costs.

Pronounced in the open Court on the 30th day of

April 1996.

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