IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 690 OF 2019
WITH
CIVIL APPLICATION NO. 1461 OF 2019
WITH
CIVIL APPLICATION NO. 1460 OF 2019

Divanbi Sirajuddin Pirjade
deceased through legal heir
Sahebpir Sirajuddin Pirjade ...Appellant
Versus
Rahul Ananda Raskar & Ors. ...Respondents

Mr. P. B. Shah a/w. Mr. K. P. Shah, for the Appellant.

Mr. Mahindra B. Deshmukh, for Respondent No.1.

CORAM : MADHAV J. JAMDAR, J.
DATED : 19th JUNE 2023

P.C. :

1. Heard Mr. Prafulla Shah a/w. Mr. Kayval Shah, learned counsel appearing for the Appellant and Mr. Mahindra Deshmukh, learned counsel appearing for Respondent No.1.

2. By way of present Second Appeal, the Appellant is challenging the legality and validity of the Judgment and Decree dated 26th

February 2019 passed by the learned District Judge-5, Sangli in Regular Civil Appeal No.254 of 2018.

3. The Appellant filed Regular Civil Suit No.87 of 2013 with respect to properties bearing Gat Nos. 651 and 655 situated at Mauje Kadegaon, Tal. Kadegaon, Dist. Sangli. In the plaint, relief is sought that the Plaintiff has got right of preemption to purchase the share of Defendant No.1, alternatively prayer is sought to the effect that half share be allotted to the Appellant.

4. It is the case of the Plaintiff that the Plaintiff is the sister of Defendant No.1. The suit properties are belonging to their father and Plaintiff has got half share in the suit properties. It is further case of the Plaintiff that her brother i.e. Plaintiff No.1 sold the property to the Defendant No.2 by registered Sale Deed dated 28th May 2010 and she came to know about the same on 25th February 2013 that Defendant No.2 took forcible possession of the suit property and therefore, suit was filed on 30th April 2013. The learned Trial Court recorded the finding that the suit properties are joint family properties of Plaintiff and Defendant No.1 and therefore, Defendant No.1 has got right to purchase the suit property by exercising right of preemption and

therefore, decreed the suit by granting declaration that the Plaintiff has got right to purchase the said property by exercising right of preemption and granted injunction. The learned First Appellate Court has set aside the said judgment and dismissed the suit.

5. The learned Trial Court after considering the mutation entries has came to the conclusion that the share which the Plaintiff has got in the suit properties is from her father-in-law and not from her father. Although it is not contended in the plaint, subsequently, it has been contended by the Plaintiff that the suit properties are joint properties of her father and father-in-law and she has got share in 50% share of her father-in-law and she was not given share in the 50% share of her father. The learned Trial Court accepted the said case and also held that the Plaintiff is in the possession of the suit properties. The learned Appellate Court has held that Plaintiff has not proved the possession over the suit properties and on the basis of evidence on record, held that the suit properties had been partitioned and after the partition, the brother i.e. Defendant No.1 has sold the property to the Defendant No.2 and therefore, held that the Plaintiff has no right of preemption.

6. It is the contention of Mr. Shah, learned counsel appearing for the Appellant that the finding recorded by the learned First Appellate Court is not in accordance with the evidence on record. It is the submission of learned counsel appearing for the Appellant that the Appellant has not received half share in the father's share of the suit property.

7. Mr. Deshmukh, learned counsel appearing for the Respondent No.1 submitted that the suit properties were partitioned and the said partition has been recorded by Mutation Entry No.7415 dated 29th September 2006. He submitted that by that mutation entry, specific lands are allotted to the respective co-sharers. He submitted that entire Gat Nos. 651 and 655 has been allotted to Defendant No.1-Jamaruddin Sahebhusen Pirjade. He submitted that entire Gat No.448 has been allotted to the sons of the Plaintiff. Mr. Deshmukh, learned counsel appearing for Respondent No.1 pointed out that by said mutation entry, the partition between the family members has been recorded on 29th September 2006 and the said mutation entry is thereafter certified. He submitted that thereafter, the Defendant No.1 sold the share allotted to him to Defendant No.2 by registered Sale

Deed dated 28th May 2010. He therefore, submitted that the learned First Appellate Court after taking into consideration the evidence on record, has rightly dismissed the suit and therefore, no interference is required.

8. Before considering the rival contentions, it is necessary to consider Section 231 as quoted in Mulla's Principles of the Mohamedan Law. The said Section 231 is regarding right to preemption and it reads as under:-

> "**Section 231:- Who may claim pre-emption:-** The following three classes of persons and no others, are entitled to claim pre-emption, namely:-
> (1) a co-sharer in the property **(shafi-I-Sharik);**
> A mukarraridar (leasee in perpetuity) holding under a co-sharer has no right to preempt as against another co-sharer;
> (2) a participator in immunities and appendages, such as a right of way or a right to discharge water **(shafi-i-khalil)**; and
> (3) owners of adjoining immovable property **(shafi-i-jar)**, but not their tenants, nor persons in possession of such property without any lawful title (Bailie, 481). A wakif or mutawalli is not entitled to preempt, as the wakf property

> does not vest in him.
>
> The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed (Baillie, 500)."

Thus, as per the said Section 231, co-sharer has right of pre-emption as against another co-sharer. It has been clarified that a mukarraridar (leasee in perpetuity) holding under a co-sharer has no right to preempt as against another co-sharer.

9. A bare perusal of the plaint clearly shows that claim regarding preemption is raised as the Appellant is claiming to be the co-sharer in the property. It is not the contention of learned counsel appearing for the Appellant as well as nothing is pointed out from record that, said right of preemption is also claimed from Class -2 or Class-3 of said Section 231. Therefore, the crucial question which is to be decided is, whether the Appellant is the co-sharer in the suit properties i.e. Gat No. 651 and Gat No.655.

10. Both the parties have heavily relied on the Mutation Entry No.7415 dated 29th September 2006. Admittedly, the said mutation entry is concerning the properties belonging to the father of the Plaintiff and the Defendant No.1 and nothing to do with the properties of father-in-law of the Plaintiff. The said Mutation Entry inter alia records as follows:-

फेरफारांची नोंदवही (फेरफार पत्रक)

{महाराष्ट्र जमीन महसुल अधिकारी अभिलेख आणि नोंदवहया (तयार करणे व सुस्थितीत ठेवणे) नियम, १९७१ यातील नियम १०.}

गांव: कडेगांव, तालुका: कडेगांव, जिल्हा: सांगली.

नोंदीचा अनुक्रमांक	संपादन केलेल्या अधिकाराचे स्वरूप	परिणाम झालेले भूमापन व उपविभाग क्रमांक	चाचणी अधिका—याची अद्याक्षरी किंवा शेरा.
७४१५	ता. २९/०९/२००६ ई. वाटणीपत्र १) कै. अब्दुलकादर साहेब हुसेन पिरजादे, मयत वारस. अ) अल्ताफ अब्दुलकादर पिरजादे. ब) जाकीरहुसेन अब्दुलकादर पिरजादे. क) जुल्फेकर अब्दुलकादर पिरजादे. ड) रिहाना साहेबपिर पिरजादे. इ) रझिया शाहन सादीकअली नवाब. ई) मोहजबी हजरतअली दुंडगे उ) फातीमाबी अब्दुलकादर पिरजादे. २) कै. दादापाशा साहेबहुसेन पिरजादे, मयत वारस. अ) सादिक दादापाशा पिरजादे ब) नसरिन दादापाशा पिरजादे. क) रूहिनिसा दादापाश पिरजादे. ३) जमरूद्दीन साहेब हुसेन पिरजादे. ४) साहेबपीर सिराजुद्दीन पिरजादे.	५२५ ५३२ ५३३ ५७७ ५७८/२ ११९५ **६५१** **६५५** ४४८ एकुण : (९)	नोंद रूजू वाटणीपत्राची प्रत पाहिली नोंद ''मंजुर.'' सही/— मंडल अधिकारी, कडेपूर, ता. कडेगांव, जि. सांगली.

	५) हुमायुन सिराजुद्दीन पिरजादे. यांनी वाटणीपत्र लिहुन ठेवले आहे की, ते खालीलप्रमाणे. नं. १ कै. अब्दुलकादर साहेबपिर पिरजादे यांचे मयत वारस अ) अल्ताफ, ब) जाकिरहुसेन, क) जुल्फेकार अब्दुलकादर पिरजादे, ड) रिहाना साहेबपिर पिरजादे, इ) रझिया शाहिन सादिकअली नवाब, ई) मोहजबी हजरतअली दुडंगे, उ) श्रीमती फातीमाबी अब्दुलकादर पिरजादे यांचे वाटणीपत्र खालीलप्रमाणे जमिन **गट नं. क्षेत्र आकार हिस्सा** १) ५२५ ८—८५ २८—९४ ख.०—०१ ०—४० २) ५३२ ०—४९ २—०० संपुर्ण गट ३) ५३३ १—३९ ६—३७ संपुर्ण गट ४) ५७७ १—०९ ६—६९ संपुर्ण गट ५) ५७८/२ ०—२८ १—७५ संपुर्ण गट नंबर २ कै. दादापाशा साहेब हुसेन पिरजादे, मयत वारस. अ) सादिक, ब) नसरीन. ३) श्रीमती रूहिनिसा दादापाशा पिरजादे यांचे वाटणीपत्र झालेली जमीन. **गट नं. क्षेत्र आकार हिस्सा** ५२५ ४—८५ २८—९४ आणे १०, आणे ६.४२ हिस्सा संपुर्ण क्षेत्र ३—२० आर **नंबर ३ जमरूद्दीन साहेबहुसेन पिरजादे यांचे वाटणीपत्र.** **गट नं. क्षेत्र आकार हिस्सा** **१) ६५१ ०—९० ७—०६ संपुर्ण गट** **२) ६५५ ०—७५ ११—६५ संपुर्ण गट** नंबर ४ साहेबपीर सिराजुद्दीन पिरजादे व ५. हुमायुन सिराजुद्दीन पिरजादे यांचे वाटणीस आलेली जमीन. **गट नं. क्षेत्र आकार हिस्सा** १) ४४८ १—८३ १५—०० आणे १० ख.०—०२ क्षेत्र १—१५ **नंबर ४ यांना**		येणेप्रमाणे असे. ता. १७/०६/२०१३ सही/— गांवकामगार तलाठी, मौजे कडेगांव, ता. कडेगांव.

	२) ४४८ १—३ १५—०० आणे ६ क्षेत्र ०—७ आर असे वरिलप्रमाणे वर्दी अदा करून वाटणीपत्राची नोंद केली असे व वाटणीपत्र फा.दा. सही/—		

(Emphasis added)

11. Therefore, the said mutation entry clearly specifies that the entire Gat Nos. 651 and 655 admeasuring 90 guntha and 75 guntha respectively is allotted to the share of Defendant No.1-Jamaruddin Sahebhusen Pirjade and 1 acre 15 R out of Gat No.448 is allotted to Sahebpeer i.e. one son of the Plaintiff and 70 R is allotted to Humayun, the other son of the Plaintiff. Thus, accordingly entire Gat No.448 is allotted to the sons of Plaintiff. Therefore, it is clear that Gat No.651 and 655 which are the suit properties are exclusively allotted to the Defendant No.1 by partition which has been recorded by Mutation Entry No.7415 dated 29th September 2006.

12. It is also significant to note that the Appellant i.e. the Plaintiff has filed suit only with respect to Gat Nos. 651 and 655 i.e. properties which are allotted to the share of Defendant No.1 and nothing is mentioned about the properties of the father which have been allotted

to her sons. Therefore, it is very clear that the properties are partitioned and the Plaintiff cannot be termed as co-sharer entitling the right of preemption. Therefore, there is no substance in the contention raised by learned counsel appearing for the Appellant.

13. The Second Appeal is dismissed, however with no order as to costs.

14. In view of the dismissal of the Second Appeal, nothing survives in the Civil Applications and the same are also dismissed.

[MADHAV J. JAMDAR, J.]