

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 611 OF 2010
WITH
CIVIL APPLICATION NO. 8889 OF 2016

Nandkumar s/o. Shankarrao Rasne,
Age 61 years, Occu. Business,
R/o. 2542, Shahaji Road, Ahmednagar,
Dist. Ahmednagar.

....Appellant.

Versus

1. Girish s/o. Dharamvir Madan,
Age 45 years, Occu. Business,
R/o. Municipal House No. 2542,
Mahatma Gandhi Road, Ahmednagar,
Dist. Ahmednagar.
2. Ramakant s/o. Shankar Rasne,
deceased through L.Rs.
- 2A. Arvind s/o. Ramakant Rasne,
Age 48 years, Occu. Business,
R/o. Deoki Road, Behind Gajana
Gadi Bhandar, Akola, Dist. Akola.
- 2B. Dr. Anil s/o. Ramakant Rasne,
Age 45 years, Occu. Medical Practitioner,
R/o. Wazire, Tq. Parner,
Dist. Ahmednagar.
- 2C. Sunil s/o. Ramakant Rasne,
Age 40 years, Occu. Service,
R/o. Shahaji Road, Ahmednagar,
Tq. & Dist. Ahmednagar.
- 2D. Manish s/o. Ramakant Rasne,
Age 37 years, Occu. Business,
R/o. Shahaji Road, Ahmednagar,
Tq. & Dist. Ahmednagar.

3. Jamnadas s/o. Prabhudas Bhagwani,
Deceased through L.Rs.
- 3A. Smt. Bai Jamnadas Bhagwani,
Age 70 years, Occu. Household,
- 3B. Rajkumar s/o. Jamnadas Bhagwani,
Age 47 years, Occu. Business,
- 3C. Moti s/o. Jamnadas Bhagwani,
Age 50 years, Occu. Business,
- 3D. Kumar s/o. Jamnadas Bhagwani,
Age 53 years, Occu. Business,
All 3A to 3D R/o. 51, Tarakpur,
Ahmednagar, Dist. Ahmednagar.**Respondents.**

Mr. V.P. Latange, Advocate for appellant.

Mr. A.K. Gawali, Advocate for respondent No. 1.

Mr. R.R. Mantri, Advocate for respondent Nos. 3A to 3D.

CORAM : T.V. NALAWADE, J.
DATED : 30th June, 2016.

JUDGMENT :

1) The appeal is filed against judgment and decree of Regular Civil Suit No. 890/2000 (Old Special Civil Suit No. 67/1995), which was pending in the Court of Civil Judge, Junior Division, Ahmednagar and also against the judgment and decree of Regular Civil Appeal No. 9/2005, which was pending in the Court of District Judge-1, Ahmednagar. The previous number of the suit was Special Civil Suit No. 67/1995. Present proceeding is filed by original defendant No. 1 and the first appeal was also

filed by the present appellant. There are concurrent findings in favour of respondent - Girish Madan.

2) In short, the facts leading to the institution of this appeal can be stated as follows :-

The suit was filed by respondent - Girish Madan for relief of partition and separate possession of his share from property bearing C.T.S. No. 3349, having area of 181.4 Sq. Mtrs. situated in Ahmednagar city. The property is given Municipal House No. 2542 for assessment purpose by the Local Body. It is the case of plaintiff that he has 3/7th share in this property as he has purchased such share from the owners of the property and so, the relief of partition was claimed. In the suit, present appellant, original defendant No. 1 filed counter claim and contended that he has right of pre-emption as provided under Partition Act, 1893 and Hindu Succession Act, 1956 and he is entitled to purchase the share which is purchased by plaintiff from the members of joint family. The suit is decreed and counter claim is dismissed.

3) The aforesaid property was owned by father of defendant Nos. 1 and 2 by name Shankar. Shankar was succeeded by six sons, widow and daughters. It was ancestral

property of Shankar and he died on 9.12.1970.

4) It is the case of plaintiff that prior to purchasing the property, he was occupying a shop having size 12 x 34 ft. situated on the ground floor of the building which is northern side of the building. It was three storied building and situated on eastern side of the property. On western side, there is dilapidated portion of this building.

5) It is the case of plaintiff that prior to purchasing of the property by him, partition had taken place amongst defendant Nos. 1 and 2, other brothers of defendant No. 1 and mother of defendant No. 1. It is contended that the sisters of defendant Nos. 1 and 2 had relinquished their right in the property long back under registered document. It is contended that when plaintiff purchased the shares of two brothers of defendant No. 1 and mother of defendant No. 1, he had obtained consent of defendant No. 1 for the said transaction. It is contended that defendant No. 1 has now created dispute and he is avoiding to effect the partition in property card. It is contended that prior to purchasing property by plaintiff, defendant No. 1 had filed Regular Civil Suit No. 632/1983 and in that suit, possession of shop premises was claimed from present

plaintiff by defendant. It is contended that as plaintiff has now purchased 3/7th portion, he may not be evicted from the suit property and property of his share viz. 3/7th needs to be given in his possession. Prayer was made to allot the portion of the property in which shop is situated to plaintiff in the partition.

6) Defendant No. 1 contested the matter by filing written statement. He contended that the suit is not tenable as five sisters are not joined as defendants and three brothers who have allegedly sold their shares and mother are not joined as parties to the suit.

7) Defendant No. 1 contended that he has filed Regular Civil Suit No. 632/1983 for getting the possession of shop premises from defendant No. 1 and due to this circumstances, the suit filed by the tenant needs to be stayed in view of the provision of section 10 of Civil Procedure Code.

8) Defendant No. 1, appellant admitted that the property was ancestral property of his father. He denied that his sisters had relinquished their right in favour of all the brothers. He contended that the sale deed executed in the year 1989 in favour of plaintiff is not binding on him and under the sale deed,

plaintiff cannot get 3/7th share. He denied that defendant No. 3 is entitled to get 2/7th share who has contended that he has purchased the shares of two brothers under other sale deed.

9) Defendant No. 1 denied that partition had taken place amongst the successors of his father. He contended that the value of the shop in possession of plaintiff is much more and so, that portion cannot be allotted to share of plaintiff.

10) Defendant No. 1 contended that as the property belongs to undivided Hindu family and as defendant No. 1 has share in the property, he is entitled to purchase the shares of remaining members by exercising right of pre-emption. He prayed for giving such relief to him and he showed readiness and willingness to pay the consideration amount as the Court may decide.

11) During pendency of this suit, the suit filed by defendant No. 1 viz. 632/1983 was decreed and at present, the decree of possession made against plaintiff who was a tenant has become final.

12) Defendant Nos. 2C and 2D, successors of other

brother of defendant No. 1 had filed written statement. They contended that they are entitled to get eastern portion of the property in the partition. They took stand that the right was relinquished by all the sisters in favour of all the brothers. They contended that western side portion is in possession of defendant No. 1. They contended that partition had taken place amongst the members of joint family. Thus, on important points inconsistent stand was taken though the case of defendant No. 1 that plaintiff is not entitled to get separate share was supported by defendant No. 2.

13) On the basis of aforesaid pleadings, issues were framed. It can be said that only defendant No. 1, present appellant contested the suit. The main contention of defendant No. 1 is about his right of pre-emption, which is made available under the provisions of section 4 of Partition Act, 1893 and under the provisions of Hindu Succession Act. Specific contention was made by defendant No. 2 that defendant No. 1 is in possession of western portion and defendant No. 2 is in possession of eastern portion. The record produced show that before City Survey Officer, defendant No. 1 had prayed for entering his name only for portion having size of 40 ft. east-west and 11 ft. north-south by contending that this portion has fallen to his

share in the partition.

14) The Trial Court had decreed the suit of plaintiff to give him 3/7th share. Counter claim of defendant No. 3 was also allowed. Declaration was given that sale deed executed by Suresh, brother of defendant No. 1, in favour of defendant No. 1 in the year 2000 is not binding on the plaintiff and also defendant No. 3. The prayer made by defendant No. 3 and plaintiff to allot the portions in their possession to their shares in partition was rejected. This decision was challenged only by defendant No. 1 - Nandkumar Rasne. District Court has decided the matter on the basis of provisions of Partition Act, 1893. For technical reason, the counter claim made by respondent No. 3 is rejected. But, it is held that the sale deed made by Suresh in favour of defendant No. 1 is not binding on plaintiff and other defendants. Both the Courts below have held that the sisters had relinquished their right in favour of all the brothers. It appears that during pendency of appeal, defendant No. 1 - Nandkumar Rasne took a new stand that plaintiff Girish Madan had sold the suit property to him. Separate suit is pending in that regard and this point is kept open by the First Appellate Court. Plaintiff denied that he has sold the suit property to defendant No. 1.

15) This Court (Other Hon'ble Judge) admitted the appeal on 30.9.2014 on following substantial question of law :-

"Whether the learned trial court, while decreeing Regular Civil Suit No. 890/2000, has committed an error apparent on the face of record, in giving finding that all the sisters of defendant nos. 1 and 2 have relinquished their share in the suit property in favour of all the brothers, without examining the sisters or without considering the evidence in support of proof of the said relinquishment deed ?"

16) As per the record, all the five sisters had relinquished their right in favour of all the brothers under registered document before starting of the dispute. On the basis of said document, application was also moved before City Survey Officer by defendant No. 1, present appellant and change in the record is made, the names of sisters of defendant No. 1 are deleted from the property card. Thus, before starting of the dispute, the sisters had given up their right. Then they filed one suit to challenge that relinquishment, but in that suit also they failed. In view of these circumstances, there is no need to discuss the circumstance that the sisters had subsequently relinquished their right in favour of defendant No. 1 only. It was

not possible for those sisters to again relinquish their right and this time in favour of defendant No. 1. In view of these circumstances, it can be said that aforesaid substantial question of law is not involved in the matter. Similarly Suresh, one brother of defendant No. 1 had already sold the share to defendant No. 3. It is the case of defendant No. 1 that Suresh then sold his share in the year 2000 to him. In view of the registered sale deed executed by Suresh in favour of defendant No. 3 and as it was not challenged by Suresh, this circumstance also could not have been considered in the present appeal. There are concurrent findings on facts on these points of the Courts below. The sisters had relinquished their right prior to 1988 and the suit was filed in the year 1995. The sale deed was executed in favour of plaintiff in the year 1989. In view of these circumstances, there was no question of consideration of provision of section 22 of the Hindu Succession Act as to relief under that provision could not have been claimed by defendant No. 2 in view of the Law of Limitation. For these reasons, there is no need to discuss the so called right of defendant No. 1 under the provisions of Hindu Succession Act. Thus, what remains is the claim of defendant No. 1 that he has right of pre-emption to purchase the suit property under section 4 of the Partition Act, 1893. Only following point can be considered in the second appeal and both

the sides argued on this point :-

"Whether Courts below did not consider relevant material on the basis of which inference could have been drawn that there is still right of pre-emption with defendant No. 1 to purchase the suit property in view of provision of section 4 of Partition Act, 1893 ?"

17) The learned counsel for appellant placed reliance on the case reported as **2002 (3) ALL MR 918 [S.C.] [Gyan Chand & Anr. Vs. Sumant Rani & Ors.]**. In this case, the Apex Court has laid down that if stranger purchaser seeks actual division and possession either in a suit or in execution proceeding, co-sharer can exercise right of pre-emption given under section 4 of Partition Act, 1893.

18) There cannot be dispute over the proposition made by the Apex Court in the case cited supra. The facts and circumstances of each and every case are always different. From the provision of section 4, it can be said that the purpose behind the provision is to see that a stranger does not enter a dwelling house of undivided family. So, basically the property involved must be dwelling house and the dwelling house must be

belonging to undivided family. Further, as it is a statutory right, it can be given up. There is specific case of plaintiff that defendant No. 1 had given consent when he purchased 3/7th share from the members of so called joint family. However, plaintiff has come with specific case that prior to the date of purchase, partition had taken place and the property was not belonging to undivided family. This case is considered by the First Appellate Court and it is held that the property was not owned by undivided family as some document was executed by them and steps were taken to see that separate portions were entered in the names of parties. Defendant No. 1 himself had taken such step by giving application in city survey office and he had requested to enter specific portion in his name as owner under the so called partition.

19) Submission was made by the learned counsel for plaintiff that the property cannot be in strict sense called as dwelling house as some portion was used for commercial purpose as there are shops. This contention cannot be accepted straight away to presume that the said shops can be separated and that portion cannot be treated as dwelling house. However, the circumstances that defendant No. 3 has purchased 2/7th share, plaintiff has purchased 3/7th share, there is record that

partition had already taken place and defendant No. 1 had given consent for selling this portion to plaintiff can be considered and used in a case like present one.

20) Some record was produced before the Trial Court regarding the consent given by defendant No. 1 for the transaction made in favour of plaintiff by two brothers and mother. This record was produced in previously instituted suit like 632/1983 and in that matter, it is held that present plaintiff proved that present defendant No. 1 had given consent for the transaction made in favour of present plaintiff. This circumstance was confronted to present defendant No. 1 in the present matter during his cross examination. Civil matters need to be decided on pre-ponderance of probability. This circumstance and other circumstance like defendant No. 1 wanted to enter specific portion of the property in his name in the property card show that he had no objection to the transaction made in favour of plaintiff. That record, application given to City Survey Office by defendant No. 1 and copy of judgment of R.C.S. No. 632/1983 is produced in the present matter. In view of these circumstances, it is not open to defendant No. 1 to say that the property which can be allotted to the share of plaintiff and defendant No. 3 is necessary for beneficial enjoyment of the portion of dwelling

house which may come to his share in the partition. This is the purpose behind the provisions of section 4 of the Partition Act, 1893. Though in strict sense defendant NO. 1 and his brothers were not constituting undivided family on the date of transaction made in favour of plaintiff, in view of the recitals of the sale deed made in favour of plaintiff and the fact that equitable partition needs to be made, the ratio of the case of **Gyan Chand** cited supra needs to be used in the present matter. However, following circumstances are against the defendant No. 1.

(i) There is record to show that partition had taken place amongst the brothers of defendant No. 1 and defendant No. 1 was party to the partition and it had taken place prior to 1989.

(ii) All the sisters had relinquished their right in the property in favour of all the brothers and due to this circumstance, the six brothers and mother were entitled to get 1/7th share each and accordingly, application was made by defendant No. 1 in the year 1990 for entering specific portion of the property in his name. This application was given after the date of sale deed made in favour of plaintiff.

(iii) The circumstance that plaintiff wanted to enter specific portion of the property in his name indicates

that he was not treating entire property as dwelling house and he wanted to get separate portion of the property by dividing the property by metes and bounds. He wanted to use his portion separately.

(iv) There is record which was created to show that defendant No. 1 had given consent to the transaction made in favour of plaintiff by two brothers of defendant No. 1 and his mother. In previous suit, Civil Court has held that such consent was proved by present plaintiff.

21) Considering the purpose behind section 4 of the Partition Act, 1893, it can be said that if a member of the undivided family who is the only person left to claim the right under section 4 of this Act and he had given consent to the other members of family to sell their portion to strangers then he cannot claim the right of pre-emption under section 4 of the Partition Act, 1893 against the stranger. Due to this single circumstance and as the burden was on defendant No. 1 to prove that he is entitled to the exercise the right under section 4 of the Partition Act, this Court holds that the Courts below have not committed any error in deciding the matter against defendant No. 1, present appellant.

22) In the result, the appeal stands dismissed. Civil Application is disposed of. The stay to the execution of the decree of eviction will be there and execution will be deferred till the actual partition is effected as per the decree made in the present matter.

23) The learned counsel for the appellant seeks stay to the decree of partition as he wants to challenge the decision of this Court. Time of eight weeks is given subject to condition that there will be no execution of the eviction decree during this time. As soon as this time expires the aforesaid order will come in to force.

[T.V. NALAWADE, J.]

ssc/