

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.450 OF 1993

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| 1. Eknath Daval Thete (since deceased)) | |
| through his legal heirs) | |
| Shri Sampat Eknath Thete) | |
| age : 63 yrs., Occupation : retired,) | |
| R/o. 32, Chaitanya Nagar, Dasak,) | |
| Near Vithal Mangal Karyalaya,) | |
| Nashik Road, Dist. Nashik.) | .. Appellant |
| | (original deft. no.2) |

Versus

- | | |
|--|----------------------|
| 1. Ganpat Dagdu Thete (since deceased)) | |
| through his legal heirs) | |
| 1.A) Smt.Saraswati Ganpat Thete,) | (original plaintiff) |
| age : 55 yrs., Occupation : Household,) | |
| resident of Palkhed, Taluka Niphad,) | |
| District – Nashik.) | |
| 1-B) Kailas Ganpat Thete) | |
| age : 27 yrs., Occupation-Agriculturist)) | |
| resident of Palkhed, Taluka Niphad,) | |
| District – Nashik.) | |
| 1-C) Sou.Ashalata Ashok Kandale) | |
| age : 25 yrs., Occupation :Household) | |
| Baswant, Taluka Niphad,) | |
| District – Nashik.) | |
| 2. Ranganath Dagdu There) | |
| age : 67 yrs., Occupation-Agriculturist)) | |
| resident of Bharvas, Vahegaon,) | |
| Post : Ghodegaon, Tal: Niphad,) | |
| District – Nashik.) | .. Respondents |
| --- | (original deft.no.1) |

Mr.Girish Agarwal for the appellant.

Mr.P.N. Joshi a/w Mr.N.M. Pujari a/w Mr.P.B. Rahade for the Respondents.1

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **10th December 2015.**
PRONOUNCED ON : **6th January 2016.**

Judgment :-

. By this Second Appeal filed under Section 100 of the Code of Civil Procedure 1908, the appellant herein (original defendant no.2) has impugned the judgment dated 26th August 1993 passed by the IV Additional District Judge, Nashik dismissing the appeal filed by the appellant against the judgment and decree dated 2nd January 1987 passed by the learned Civil Judge, Junior Division, Pimpalgaon-Baswant, District-Nashik allowing the suit filed by the respondent no.1 herein (original plaintiff). For the sake of convenience, the parties to these proceedings are described in the later part of the judgment as they were described before the trial Court. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

2. Gat No.876 admeasuring 23 Ares assessed to Rs.0.97 ps., Gat No.885 admeasuring 1-59 hectares assessed to Rs.8.19 ps. and Gat No.873 measuring 55 Ares assessed to Rs.0.69 ps. of Palkhed in Niphad taluka are the suit lands. The suit lands were ancestral and joint family property of the plaintiff, defendant no.1 and their brother deceased Kashinath. The brother Kashinath died in the year 1975 leaving no heirs. The plaintiff and the defendant no.1 each accordingly acquired one half share in the suit land. There was no partition amongst the plaintiff and the defendant no.1 in respect of the suit lands.

3. It was the case of the plaintiff that the defendant no.1 without informing the plaintiff sold his one half share to the defendant no.2. It was the case of the plaintiff that the defendant no.1 was conducting a hotel in the beginning and the plaintiff was cultivating the suit lands and paying share in the income to the defendant no.1. It was the case of the plaintiff that the defendant no.2 had obtained forcible possession of the suit lands and the entire Gat No.876, western one half portion of Gat No.885 and the entire Gat No.873 were in illegal possession of the defendant no.2.

4. In or about 1980, the plaintiff issued a notice under Section 22 of the Hindu Succession Act, 1956 to the defendant no.1 thereby exercising the preferential right under the said provision in respect of the suit property. On 3rd July 1980, the plaintiff filed a suit in the Court of Civil Judge, Junior Division, Nashik (Regular Civil Suit No.450 of 1980) inter alia praying for a declaration and possession of the suit property and in the alternative, for partition and possession of the suit property against the defendant no.2. The defendant no.1 protested the said suit by filing a written statement. In the said written statement, he admitted that the plaintiff and he each had one half share in the suit lands and contended that both were cultivating their respective lands separately since 12 years. He denied that the suit lands were never partitioned. He also denied that he had sold his share to the defendant no.2 without knowledge of the plaintiff. He contended that he had sold his one half share in the suit lands to the defendant no.2 by Sale Deed dated 7th June 1979 and since then, the defendant no.2 was in possession of the suit lands. He denied that the plaintiff had any preferential right to purchase the suit lands of his share. The

defendant no.1 also raised an issue of jurisdiction in the said written statement. The defendant no.2 also filed a separate written statement and raised identical issues which were raised by the defendant no.1.

5. Learned trial Judge framed 7 issues and rendered findings thereon. The plaintiff adduced his evidence and deposed that the suit lands were ancestral property and that the plaintiff and the defendant no.1 each had equal share in the suit lands.

6. By a judgment and decree dated 2nd January 1987, the learned trial Judge ordered that the plaintiff had preferential right to purchase the interest and share of the defendant no.1 in the suit lands under Section 22 of the Hindu Succession Act, 1956. It was held that the suit lands were partitioned and separate possession of each one half share was given to the plaintiff and the defendant no.1. It was ordered that the partition of the suit lands was made by the Collector or any gazetted sub-ordinate to him under Section 54 of the Code of Civil Procedure, 1908. Learned trial Judge held that the plaintiff, however, was not entitled to mesne profits since he had not proved that the land of his share was in defendant's possession at any time.

7. Being aggrieved by the said judgment and decree dated 2nd January 1987, both the defendants filed an appeal (Civil Appeal No.103 of 1987) against the original plaintiff in the Court of District Judge, Nashik.

8. By an order and judgment dated 26th August 1993, the learned IV Additional District Judge, Nashik dismissed the said Civil

Appeal No.103 of 1987 and declared that the plaintiff had preferential right to purchase from the defendant no.1 the share of the defendant no.1 in the disputed lands transferred under Sale Deed dated 7th June 1979 in favour of the defendant no.2 on payment of consideration stated in the said sale deed. It was further declared that the Sale Deed dated 7th June 1979 was not binding upon the plaintiff. By the said order, the Lower Appellate Court directed the defendant no.2 to hand over possession in favour of the plaintiff on receiving all such payment from the plaintiff. The Lower Appellate Court directed that the plaintiff shall execute the decree after four months from the date of the said order i.e. from 26th August 1993.

9. Being aggrieved by the said order and judgment dated 26th August 1993, the defendant no.2 only filed this second appeal under Section 100 of the Code of Civil Procedure, 1908 in this Court. The original defendant no.1 did not file any appeal.

10. This Court admitted this second appeal on 1st December 1993 on the following substantial questions of law :-

- “(c) That the Learned Appellate Judge committed a grave and error in passing the decree of the kind which is for declaration of the kind and the sale deed being null and void and directing delivery of possession of the half share of the present appellant purchased from the defendant no.1 in the absence of any suit there being such less any counter claim and/or any cross-objection.*
- (d) That the substantial question of law would be whether the Appellate Court was right in holding that the Civil Court has observed in para 14 of his judgment when Section 36A of the Bombay Prevention of Fragmentation (Consolidation and Holding) Act, 1947 excepts jurisdiction of the court in that behalf.*

- (e) *That the substantial question of law would be whether the Appellate Court was in fixing the price and direction that on repayment of the consideration shown in the Sale Deed of 1979 the object was to become owner when the proceedings in question has been under Section 22 of the Hindu Succession Act nor the question of bonafides improvement etc. was gone into and that no claim in that behalf has been decreed.*
- (f) *That the substantial question of law would be whether the Appellate Court was right in passing a decree in the absence of there being any suit and when no relief of the kind was asked for and when such a relief could not have been granted in the present suit, especially and particularly when even against the decree of the trial court no cross-objection and/or cross appeal was filed.*
- (g) *That the court below committed an error in holding that the provision of Section 22 in the instant case will apply when the defendant no.1 was having a half share which came to be sold to defendant no.2 i.e. the appellant.”*

11. Mr.Agarwal, learned counsel appearing for the appellant herein (defendant no.2) invited my attention to the order passed by the two Courts below, correspondence exchanged between the parties which were forming part of the record and some part of the pleadings. It is submitted by the learned counsel that the learned trial Judge had allowed the time barred claim made by the plaintiff. In support of this submission, he invited my attention to the notice dated 23rd June 1980 issued by the plaintiff thereby claiming a preferential right in the suit property and the Sale Deed dated 7th June 1979 executed between the defendant no.1 and the defendant no.2 which was duly registered. Learned counsel placed reliance on Article 97 of the Schedule to the Limitation Act, 1963. It is submitted that since the defendant no.2 was handed over possession of the suit lands by the defendant no.1 on the date of execution of Sale

Deed dated 7th June 1979 when the said property was sold to the defendant no.2, the cause of action arose for filing a suit for enforcement of a right of pre-emption on the date of handing over such possession to the defendant no.2 by the defendant no.1 and the suit ought to have been filed within one year from the date of handing over possession of the suit property to the defendant no.2.

12. It is submitted that in the alternative, even if the physical possession of the suit property was not handed over to the defendant no.2 by the defendant no.1, the suit was required to be filed within one year from the date of registration of the sale deed. He submits that admittedly, the suit was filed on 24th July 1980 which was beyond the period of one year from the date of the defendant no.1 handing over the possession of the suit property to the defendant no.2 or in any event within one year from the date of registration of the said sale deed.

13. It is submitted by the learned counsel for the defendant no.2 that even in the notice issued by the plaintiff and also in the plaint, the plaintiff had averred that the defendant no.2 had already taken possession of the suit property in the month of June or July 1979. He submits that though the defendant no.2 had not raised a plea of limitation in the written statement filed before the learned trial Judge, in view of Section 3 of the Limitation Act, 1963, the suit being barred by law of limitation, learned trial Judge was bound to dismiss the said suit although the limitation had not been set up as a defence.

14. It is submitted by the learned counsel for the defendant no.2 that though this Court had not framed any substantial question of law in

so far as the issue of limitation is concerned, in view of the proviso to Section 100 of the Code of Civil Procedure, the powers of this Court are not taken away or abridged to hear the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question, for the reasons to be recorded. He submits that since the claim made by the plaintiff was ex-facie barred by law of limitation and since the learned trial Judge has allowed the time barred claim in favour of the plaintiff and had not dismissed the suit by exercising the powers under Section 3 of the Limitation Act, 1963, this Court shall frame additional substantial question of law at this stage that the suit claim was barred by law of limitation and shall decide the said additional substantial question of law.

15. Learned counsel for the defendant no.2 placed reliance on the judgment of this Court in the case of ***Ramchandra Nathu Ghadage & Ors. Vs. Rajaram Nathu Ghadage (dead) By Lrs. & Ors.***, reported in ***2007(5) ALL MR 175*** and in particular paragraphs 10 and 11 thereof in support of the submission that the additional substantial question of law can be framed by the Court while hearing the second appeal filed under Section 100 of the Code of Civil Procedure, 1908.

16. Learned counsel for the defendant no.2 placed reliance on the judgment of Andhra Pradesh Court in the case of ***Akkammagari Bheemamma Vs. Akkammagari Balamma & Ors.***, reported in ***AIR 2009 Andhra Pradesh 202*** and in particular paragraphs 6 and 8 thereof. Relying upon the said judgment of the Andhra Pradesh High Court, it is submitted that starting point for computation of limitation

of one year in a suit for enforcement of right of pre-emption is from the date on which possession of property was taken.

17. Learned counsel for the defendant no.2 also placed reliance on the following judgments on the issue of limitation raised by the defendant no.2 :-

- (i) Judgment of Gauhati High Court in the case of Gourish Banik and Anr. Vs. Smt.Arati Banik & Ors., reported in AIR 2013 Gauhati 60 (paragraph 17);**
- (ii) Judgment of Orissa High Court in the case of Prahallad Ch. Mohanty and Anr. Vs. Surendra Nath Mohanty and Ors., reported in AIR 2008 Orissa 122 (paragraph 11);**
- (ii) Judgment of Punjab and Haryana High Court in the case of Vinod Kumar and Anr. Vs. Suresh Pal, reported in AIR 1985 Punjab and Haryana 361 (paragraphs 3 to 7).**

18. The next submission of the learned counsel for the defendant no.2 is that in view of Section 36-A of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short the said Fragmentation Act), the Civil Court had no jurisdiction to settle, decide or deal with any question which was by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.

19. Reliance is also placed on Section 36-B of the said Fragmentation Act. It is submitted that since the issue had arisen before the learned trial Judge that by virtue of execution of sale deed in respect of the suit property by the defendant no.1 in favour of the

defendant no.2 whether there was any fragmentation of holdings, the learned trial Judge himself could not have decided the said issue and ought to have referred the said matter to the competent authority to settle, decide and deal with such issue in accordance with the provisions of the said Fragmentation Act and was bound to stay the suit till such determination was completed by such competent authority on decision of such competent authority was received by the Court.

20. Sections 36-A and 36-B of the Fragmentation Act read thus:-

“36-A. Bar of jurisdiction –

- (1) *No Civil Court or Mamlatdar's Courts shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the State Government or any officer or authority.*
- (2) *No order of the State Government or any such officer or authority made under this Act shall be questioned in any Civil, Criminal or Mamlatdar's Court.*

36-B. Suits involving issues required to be decided under this Act -

- (1) *If any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as 'the competent authority') the Civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination.*
- (2) *On receipt of such reference from the Civil Court or Mamlatdar's Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court or Mamlatdar's Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.”*

21. Learned counsel for the defendant no.2 placed reliance on the judgment of the Supreme Court in the case of ***Shevantabai Maruti Kalhatkar Vs. Ramu Rakhamaji Kalhatkar and Anr.***, reported in **1998 (3) Mh.L.J. 834**, in support of the submission that the learned trial Judge was bound to refer the issue of fragmentation to the competent authority for determination. He also placed reliance on the judgment of this Court in the case of ***Shri Tanaji Krishna Shinde Vs. Mahadeo Maruti Pisal & Ors.***, reported in **2015 (6) ALL MR 50** and in particular paragraph 3 thereof in support of his submission.

22. Mr.Joshi, learned counsel appearing for the plaintiff, on the other hand, strongly raised an objection on the submission made by the learned counsel for the defendant no.2 that an additional substantial question of law on the issue of limitation shall be framed by this Court at this stage on the ground that the plea of limitation is a mixed question of fact and law. He submits that though both the defendants had filed separate written statements before the learned trial Judge, no issue of limitation was raised. Learned trial Judge accordingly did not frame any issue of limitation. Even at the stage of arguments before the learned trial Judge, no such issue of limitation was raised. No issue of limitation was raised even in the appeal memo filed before the Lower Appellate Court by the defendant no.2. The defendant no.2 also did not make any submission on the plea of limitation before the Lower Appellate Court. Issues were framed by the learned trial Judge on 23rd April 1985. No grounds are raised in the second appeal filed by the defendant no.2 on the issue of limitation. Even at the stage of admission of this appeal in the year 1993, the defendant no.2 did not advance any submission on

the plea of limitation. The issue of limitation has been raised for the first time now at this stage.

23. It is submitted by the learned counsel for the plaintiff that for framing an additional substantial question of law by this Court, the defendant no.2 (appellant herein) has to make an application in writing before this Court demonstrating as to why such issue could not be raised earlier and whether such issue would be a substantial question of law which is required to be framed and adjudicated upon at this stage to enable the opponent to deal with such application and to demonstrate that no such additional substantial question of law can be framed at this stage. He submits that no such application is made by the defendant no.2 (appellant herein) for framing additional substantial question of law in writing or has not demonstrated before this Court as to how the said issue of limitation which is a mixed question of fact and law is required to be framed as an additional substantial question of law at this stage. Learned counsel for the plaintiff distinguishes the said judgment of this Court in the case of *Ramchandra Nathu Ghadage & Ors. (supra)* relied upon by the learned counsel for the defendant no.2 on the ground that the facts before this Court in the said judgment are totally distinguishable in the facts of this case. There was no issue of limitation raised in the said matter.

24. In his alternative submission, it is submitted by the learned counsel for the plaintiff that even from the material produced by the defendant no.2 for consideration of this Court on the issue of limitation now raised in any event would not even *prima facie* prove that the claim made by the plaintiff was barred by law of limitation. He submits that if

this issue would have been raised by any of the defendants before the trial Court, the plaintiff could have led oral evidence along with documentary evidence to demonstrate that the claim made by the plaintiff was not barred by law of limitation. He submits that in any event, in this case, the sale deed was executed on 7th June 1979. The name of the defendant no.2 was mutated in the revenue record only on 4th November 1979. The plaintiff had issued a notice exercising his right of pre-emption by notice dated 23rd June 1980. The defendants denied the said claim of the plaintiff vide his reply dated 3rd July 1980. The plaintiff had filed a suit on 24th July 1980. He submits that the suit filed by the plaintiff was thus within the time and not barred by law of limitation. He submits that whether the possession of the suit property was given to the defendant no.2 or not and when is a disputed question and thus cannot be decided at this stage after 35 years.

25. In so far as the issue of jurisdiction raised by the learned counsel for the defendant no.2 on the ground that the learned trial Judge ought to have referred the issue of fragmentation to the competent authority under Sections 36-A and 36-B of the said Fragmentation Act for adjudication and had no jurisdiction to decide the said issue itself is concerned, it is submitted by the learned counsel for the plaintiff that none of the defendants had applied before the learned trial Judge to refer the issue of fragmentation to the competent authority for adjudication. He submits that in any event, there was no dispute about the total measurement of the entire plot and also the area of the plot sold by the defendant no.1 to the defendant no.2 and about the balance area left after such sale was effected. He submits that the State Government had issued a notification under Section 5 of the said

Fragmentation Act determining the standard area for class of land in the District Nashik as 20 Ares or 20 Gunthas.

26. It is submitted by the learned counsel that the learned trial Judge after considering the total admitted area and the area of the plot sold by the defendant no.1 to the defendant no.2 which was not disputed by the defendant no.1 or defendant no.2 had come to the conclusion that the balance area after such sale of the land by the defendant no.1 in favour of the defendant no.2 was less than the standard area notified by the State Government by the notification under Section 5 of the said Fragmentation Act.

27. It is submitted that the said finding of facts rendered by the learned trial Judge was based on the admitted documents and after considering the standard area notified by the State Government under Section 5 of the said Fragmentation Act. He submits that since there was no dispute about total area and the area sold under the sale deed by the defendant no.1 to the defendant no.2 and after considering such area, the balance area left was less than the standard area and that the fragment was created in view of such execution of sale deed, there was no issue which was required to be referred to the competent authority for adjudication under Sections 36-A and 36-B of the Fragmentation Act. He submits that the learned trial Judge was thus right in exercising his jurisdiction on the basis of admitted facts and has rightly rendered a finding that fragment was created in view of such sale deed. He submits that the learned trial Judge has not decided this issue beyond the jurisdiction of the trial Court under Sections 36-A and 36-B of the said Fragmentation Act.

28. Learned counsel for the plaintiff also invited my attention to Sections 2(4), 2(10), 5, 7, 8 and 9 of the said Fragmentation Act and would submit that under the aforesaid provisions, fragmentation of a land is absolutely prohibited and accordingly, the sale deed was rightly declared as illegal. He submits that both the Courts below have rendered a concurrent finding that the plaintiff was left with an area less than 20 Ares and thus a fragment was created and accordingly the said transaction between the defendant no.1 and defendant no.2 was void.

29. It is submitted by the learned counsel for the plaintiff that there was no dispute that the suit property was an ancestral property in which the plaintiff and the defendant no.1 had undivided equal rights and the plaintiff had preferential right to acquire the interest of the defendant no.1 in the suit land which was proposed to be transferred by the defendant no.1 in favour of the defendant no.2. He submits that the defendant no.2 had not disputed such rights of the plaintiff to have a preferential right to acquire the interest of the defendant no.1 which was proposed to be transferred in favour of the defendant no.2. He submits that the learned trial Judge has considered the case of the plaintiff under Section 22 of the Hindu Succession Act, 1956 and other provisions of law and has rendered findings of facts which findings are confirmed by the Lower Appellate Court and there being concurrent findings of facts, this Court cannot interfere with such concurrent findings of facts which are not perverse.

30. In so far as the issue of consideration decided by the Lower Appellate Court which was required to be paid by the plaintiff to the defendant no.2 is concerned, it is submitted that there is no infirmity in

the order passed by the Lower Appellate Court determining the consideration payable by the plaintiff for exercising preferential right of pre-emption by considering the consideration amount mentioned in the sale deed executed between the defendant no.1 and defendant no.2 which consideration was not disputed by the defendant no.1 and defendant no.2. Under Order XLI Rule 33 of the Code of Civil Procedure, 1908, the appeal Court has wide powers to modify the decree passed by the trial Court. The plaintiff was not required to file any cross-objection for modification of the decree passed by the learned trial Judge. He submits that the plaintiff has already deposited the entire amount admittedly as determined by both the Courts below. Learned counsel for the plaintiff distinguishes the other judgments relied upon by the learned counsel for the defendant no.2 on the ground that none of those judgments applies to the facts of this case and would not assist the case of the defendant no.2.

31. Mr.Agarwal, learned counsel appearing for the defendant no.2 in his rejoinder, in so far as the issue of limitation is concerned, submits that in the notice dated 23rd June 1980 issued by the plaintiff, it was alleged by the plaintiff himself that the defendant no.2 had taken possession of the suit property last year. The plaintiff once again placed reliance on the averments made in the plaint reiterating that the possession of the suit property was taken by the defendant no.2 last year. He placed reliance upon the averments made in the plaint and would submit that even in the plaint, there was an averment that the possession of the suit property was taken by the defendant no.2 in the month of June or July 1979.

32. In so far as the amount of consideration decided by the Lower Appellate Court for the first time is concerned, he submits that the compensation/consideration has to be decided only by the Collector and could not have been decided by the Lower Appellate Court for the first time.

33. Learned counsel for the defendant no.2 placed reliance on the judgment of this Court in the case of **Subhash Shripati Patil & Ors. Vs. Pralhad Pandurang Tawar**, reported in **2013(5) ALL MR 599** and in particular paragraphs 5 and 6 in support of his submission that only the competent authority under the provisions of Sections 36-A and 36-B of the said Fragmentation Act could decide the issue referred by the Court under the said provisions and nobody else. Learned counsel for the defendant no.2 also placed reliance on the judgment of this Court in the case of **Ashok Yeshwant Dhumal (deceased) through LRs. Vs. Shankar Maruti Dhumal & Anr.**, reported in **2001 (3) Bom. C.R. 27** and in particular paragraphs 8, 9 and 11 thereof and would submit that the said Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 is a complete code in itself and thus adjudication which could be done only by the competent authority could not be determined by a Civil Court. He submits that jurisdiction of the Civil Court is barred by law of limitation under Section 36-A of the said Fragmentation Act. The only question is whether under the said Fragmentation Act, an owner is entitled to be in possession of the holding to which he is entitled to under the scheme.

34. Learned counsel for the defendant no.2 placed reliance on the judgment of Supreme Court in the case of **Gundaji Satwaji Shinde**

Vs. Ramchandra Bhikaji Joshi, reported in ***AIR 1979 SC 653*** and in particular paragraphs 8, 9 and 18 thereof on the issues which can be decided by the Mamlatdar's Courts and the jurisdiction of the Civil Court is ousted in dealing with those issues.

35. Learned counsel for the defendant no.2 placed reliance on Section 10 of the said Fragmentation Act and submits that even if there was any fragmentation of a land, any owner of a fragment land can transfer such land only to the State Government on payment of such compensation determined by it and such land cannot be transferred to a private party.

REASONS AND CONCLUSIONS:-

**Whether this Court can frame an additional issue of limitation
as a substantial question of law at this stage**

36. It is not in dispute that the appellant had not raised any plea of limitation in the written statement filed before the learned trial Judge. The learned trial Judge also did not frame any issue of limitation though framed various other issues. None of the parties led any oral evidence on the issue of limitation. Learned trial Judge accordingly did not decide as to whether the claims made by the respondent no.1 herein (original plaintiff) were barred by law of limitation or not. The appellant also did not raise any issue of limitation in the appeal memo before the Lower Appellate Court nor raised any such issue across the bar. The Lower Appellate Court also accordingly did not decide the issue as to whether the claims made by the plaintiff were barred by law of limitation.

37. In the second appeal filed before this Court, when this Court admitted the second appeal on 1st December 1993, even at that stage, the appellant did not raise any issue of limitation. No grounds are raised in the appeal memo on the issue of limitation. No substantial question of law on limitation is formulated by the defendant no.2. This Court accordingly after hearing the parties framed five substantial questions of law but did not frame any issue of limitation as a substantial question of law. The issue of limitation has been raised by the learned counsel for the appellant for the first time when he commenced his arguments at the stage of final hearing of the second appeal now.

38. In support of the submission that this Court can frame an additional substantial question of law even at this stage, learned counsel for the appellant placed reliance on the proviso to Section 100 of the Code of Civil Procedure 1908 and it is submitted that the powers of this Court are not taken away or abridged to hear the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question, for the reasons to be recorded. Reliance is also placed on Section 3 of the Limitation Act, 1963 in support of the submission that whether the defence of limitation is set up or not, the trial Court was bound to reject the time barred claim. It is submitted that issue of limitation can be raised by the defendants at any stage. Reliance is placed on the judgment of this Court in the case of *Ramchandra Nathu Ghadage & Ors. (supra)* and also the judgment of Andhra Pradesh High Court in the case of *Akkammagari Bheemamma (supra)* and three other judgments.

39. On the other hand, the submission of the learned counsel for the respondent no.1 (original plaintiff) is that issue of limitation is a mixed question of fact and law. Since the appellant did not raise this issue at any stage since inception till the stage of admission of this appeal and for last twenty three years thereafter, this issue cannot be allowed to be raised at this stage. It is also submitted by the learned counsel for the respondent no.1 that the appellant did not make any application for framing an additional substantial question of law in writing by demonstrating as to why such issue could not be raised earlier and how such issue would be a substantial question of law which is required to be framed and to be adjudicated upon by this Court. He submits that the respondent no.1 thus would be deprived of an opportunity to prove before this Court that the claim made by the respondent no.1 would not be barred by law of limitation.

40. A perusal of Section 100 of the Code of Civil Procedure, 1908 indicates that in an appeal under the said provision, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. It further provides that the appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question under the proviso to Section 100 of the Code of Civil Procedure, 1908. However, it is provided that nothing in that sub-section to Section 100 shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question

of law, not formulated by it, if it is satisfied that the case involves such question.

41. There is no dispute that the appellant has urged the issue of limitation for the first time across the bar and that also at this stage when the matter was being heard finally in the year 2015 which was filed in the year 1993. The appellant did not make any application before this Court for framing an additional substantial question of law which was not raised at any stage prior to the oral submission made at this stage. The appellant did not demonstrate before this Court as to how the issue of limitation in the facts and circumstances of this case would be a substantial question of law and though not formulated earlier, has to be framed and is required to be determined by this Court at this stage.

42. In my view, learned counsel for the respondent no.1 (original plaintiff) is right in his submission that the issue of limitation is a mixed question of fact and law. If the appellant would have raised this issue before the learned trial Judge in the written statement, the learned trial Judge would have framed that issue on which both the parties would have led oral as well as documentary evidence. There is no dispute that Article 97 of the Schedule to the Limitation Act, 1963 would apply to the suit filed by the plaintiff.

43. In my view, if the appellant is allowed to raise this issue of limitation at this stage after more than 35 years of filing of the suit, the respondent no.1 (original plaintiff) would not be able to meet the plea of limitation at this stage by leading any evidence. The respondent no.1 also would not be able to deal with the plea as to whether any substantial

question of law arises in view of oral plea of limitation raised by the appellant at this stage across the bar in the absence of any application in writing made by the appellant and without giving an opportunity to the respondent no.1 to meet such plea of the appellant made across the bar. Unless the appellant would have filed an application and would have demonstrated before this Court that issue of limitation arises in the facts and circumstances of this case which requires adjudication by this Court, this Court cannot record any reason for formulating additional substantial question of law on the issue of limitation.

44. Be that as it may, on perusal of the documents and the pleadings to which my attention was invited by the learned counsel for both the parties, this Court cannot render any conclusive finding at this stage that the claims made by the respondent no.1 (original plaintiff) were barred by law of limitation in absence of any oral evidence on record. I am, therefore, not inclined to formulate any additional substantial question of law on the issue of limitation as urged by the learned counsel for the defendant no.2 across the bar at this stage in the facts and circumstances of this case.

45. In so far as the judgment of this Court in the case of *Ramchandra Nathu Ghadage & Ors. (supra)* relied upon by the learned counsel for the defendant no.2 on the issue whether the High Court can hear the appeal on any other substantial question of law, not earlier formulated by it, if the High Court feels satisfied that the case involves such question and records reasons for its satisfaction is concerned, there is no dispute about the proposition of law laid down by this Court in the said judgment. However, this Court is not satisfied with the

reasons rendered across the bar by the appellant for framing an additional substantial question of law which was not formulated by this Court at the stage of admission of this appeal. The said judgment of this Court in the case of *Ramchandra Nathu Ghadage & Ors. (supra)* thus does not assist the case of the defendant no.2.

46. In so far as the judgment of the Andhra Pradesh High Court in the case of *Akkammagari Bheemamma (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, it is held by the Andhra Pradesh High Court that starting point for computation of limitation under Article 97 of Schedule to the Limitation Act, 1963 is the date on which possession of the property was taken. In that matter, the suit was filed after a lapse of 11 years. In the facts of this case on the basis of material available on record, this Court cannot decide conclusively as to whether the claims made by the respondent no.1 was barred by law of limitation or not. The judgment of the Andhra Pradesh High Court thus does not assist the case of the defendant no.2.

47. In so far as the judgment of Gauhati High Court in the case of *Gourish Banik and Anr. (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, the plaintiff in that matter had filed a claim in the nature of pre-emption by way of amendment only after one year of the date of knowledge. In those circumstances, the Gauhati High Court held that claim was barred by law of limitation in view of Article 97 of the Schedule to the Limitation Act, 1963. In this case, it is the case of the respondent no.1 that the mutation entry was made in the revenue record only on 4th November 1979. The respondent no.1 had issued a notice for claiming right of pre-emption on 23rd June

1980. The said claim was denied by the appellant on 3rd July 1980. The suit was filed on 24th July 1980. In my view, the facts before the Gauhati High Court were different than the facts of this case. The judgment of the Gauhati High Court thus does not assist the case of the defendant no.2.

48. In so far as the judgment of the Orissa High Court in the case of *Prahallad Ch. Mohanty and Anr. (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, it was established before the Orissa High Court that the defendants were in possession of purchased part of house since the date of purchase. In my view, the facts before the Orissa High Court were different than the facts of this case. The judgment of the Orissa High Court thus does not assist the case of the defendant no.2.

49. In so far as the judgment of the Punjab and Haryana High Court in the case of *Vinod Kumar and Anr. (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, the facts before the Punjab and Haryana High Court were different than the facts of this case and the said judgment does not assist the case of the defendant no.2.

50. The next question that arises for consideration of this Court is whether the learned trial Judge ought to have referred the issue of fragmentation to the competent authority under Sections 36-A and 36-B of the said Fragmentation Act for adjudication and had no jurisdiction to decide the said issue itself.

51. A perusal of the records indicates that the appellant herein (original defendant no.2) though had filed a separate written statement

before the learned trial Judge did not raise an issue that issue of fragmentation could not be decided by the learned trial Judge in view of bar under Sections 36-A and 36-B of the said Fragmentation Act and thus the same was required to be referred to, settled, decided or dealt with only by the competent authority under the provisions of the said Fragmentation Act.

52. A perusal of the records further indicates that there was no dispute that the defendant no.1 had executed a sale deed in respect of the suit property in favour of the defendant no.2 herein. There was also no dispute that according to the notification issued by the State Government under Section 5 of the said Fragmentation Act, standard area notified in the District Nashik was 20 Ares or 20 Gunthas. There was also no dispute that in the total area of the plot, the plaintiff and the defendant no.1 had claimed rights in the equal area. There was no dispute that after effecting the sale of the particular area by the defendant no.1 in favour of the defendant no.2, the balance area left was less than the standard area i.e. 20 Ares or 20 Gunthas as notified by the State Government under Section 5 of the said Fragmentation Act. In view of these undisputed facts before the learned trial Judge, the learned trial Judge rendered a finding of fact that there would be a fragmentation of the land and the remaining area would be less than the standard area notified by the State Government under Section 5 of the said Fragmentation Act and accordingly held on that ground itself that the sale of the said property would be barred under Section 8 of the said Fragmentation Act.

53. A perusal of Sections 36-A and 36-B of the said Fragmentation Act clearly indicates that only if any issue which is required to be settled, decided or dealt with by any competent authority under the said Fragmentation Act, then in that event, the Civil Court or Mamlatdar's Court shall stay the suit and refer such issue to such competent authority for determination. If such issue is accordingly referred to the competent authority, the competent authority is required to communicate its decision to the Civil Court or Mamlatdar's Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

54. In my view, the trial Court in the facts and circumstances of this case, was not required to refer the issue of fragmentation to the competent authority at the first instance on the ground that no such issue was raised by the appellant (original defendant no.2) or by the respondent no.2 (original defendant no.1). Be that as it may, since there was no dispute about the total area of the plot sold by the defendant no.1 to the original defendant no.2 and the total balance area left after execution of sale deed, the learned trial Judge was empowered to render a finding based on admitted facts that there would be a fragmentation of the land. In my view, since there was no dispute between the parties about balance area left, there was no issue before the learned trial Judge which could be referred to the competent authority for settling, deciding or dealing with such issue. In my view, there is thus no merit in the submission of the learned counsel for the defendant no.2 that the learned Civil Judge could not have decided the alleged issue of fragmentation of the suit land and was bound to refer such issue for determination to

the competent authority in the facts of this case. If the appellant would have raised such issue or if there would have been a dispute about the balance area after execution of the sale deed and whether such balance area would create a fragment of land or not, only in that event, the trial Court was bound to stay the trial Court proceedings and to refer such issue to the competent authority for adjudication.

55. In my view, the learned trial Judge as well as the Lower Appellate Court had not acted without jurisdiction by not referring the alleged issue of fragmentation to the competent authority in the facts and circumstances of this case.

56. In so far as the judgment of the Supreme Court in the case of *Shevantabai Maruti Kalhatkar (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, the Supreme Court in the said judgment has held that the Civil Court cannot go behind the order passed by the competent authority under Section 36-B of the said Fragmentation Act, once the Civil Court had made a reference to the competent authority regarding validity of the sale transaction and the sale was held to be valid by the competent authority. In my view, the said judgment does not apply to the facts of this case even remotely. The issue was not referred by the Civil Court to the competent authority for adjudication and thus there was no occasion for the Civil Court to decide contrary to the recommendation, if any, made by the competent authority. The said judgment of the Supreme Court does not assist the case of the defendant no.2.

57. In so far as the judgment of this Court in the case of *Tanaji Krishna Shinde (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, the Lower Appellate Court in the said matter had issued direction to the defendants to immediately apply for permission to sell the suit land in favour of the plaintiff. In this case, since there was no dispute that the balance area of the plot after considering the area of plot sold by the defendant no.1 in favour of the defendant no.2 was fragment land, no such direction was issued by any of the Courts below for the purpose of adjudication. The said judgment of this Court would not assist the case of the defendant no.2.

58. Section 2(4) of the said Fragmentation Act provides for definition of "Fragment" i.e. fragment means a plot of land of less extent than the appropriate standard areas determined under the said Act. Under 2(10) of the said Fragmentation Act defines the term "Standard Area" i.e. the area which is determined by the State Government under Section 5 as the minimum area necessary for profitable cultivation in any particular local area including a standard area revised under the said section. Section 5 empowers the State Government to determine the standard area for each class of land in such local area after making such further inquiry as it may deem fit. Section 7 of the said Fragmentation Act provides for restrictions in transferring and giving on lease of fragments. Section 8 of the said Fragmentation Act provides that no land in any local area shall be transferred or partitioned so as to create a fragment. Section 9 of the said Fragmentation Act provides for penalty for transfer or partition contrary to provisions of the Act. It provides that the transfer or partition of any land contrary to the provisions of the said Act shall be void.

59. Section 10 of the said Act provides that any owner of a fragment may transfer it to the State Government on payment of such compensation to persons possessing interest therein as the Collector may determine and thereupon the fragment shall vest absolutely in the State Government free from all encumbrances. It is further provided in the said section that no such fragment shall be transferred to the State Government unless it is first offered to the owner of a contiguous survey number or recognized sub-division of a survey number on payment of the compensation determined by the Collector and such owner has refused to purchase the fragment on payment of such compensation. Sections 36-A and 36-B provides for bar of jurisdiction of the Civil Court or Mamlatdar's Court to settle, decide or deal with any question which is by or under the said Act required to be settled, decided or dealt with by the State Government or any officer or authority. Section 36-B provides that if any suit instituted in any Civil Court or Mamlatdar's Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues, the Civil Court or Mamlatdar's Court shall stay the suit and refer such issues to such competent authority for determination. Since there was no dispute that there was a fragmentation of a land, admittedly, the learned trial Judge, in my view, is right in declaring the said transaction between the defendant no.1 and the defendant no.2 as void being contrary to the said provisions of the said Fragmentation Act.

60. Section 22 of the Hindu Succession Act, 1956 clearly confers additional right of pre-emption in case of interest in any immovable property devolving upon two or more heirs specified in

clause I of the Schedule and in case any one of such heirs proposing to transfer his or her own interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The plaintiff being a brother of the defendant no.1 and was having joint interest in the suit property and rightly applied for pre-emption in the share of the defendant no.1 in the suit property by exercising right under Section 22 of the Hindu Succession Act, 1956, the learned trial Judge as well as the Lower Appellate Court have considered the said provision of Section 22 of the Hindu Succession Act, 1956 and have rendered a concurrent finding of fact that the plaintiff was entitled to apply for pre-emption and purchase the share of the defendant no.1 in the suit property before the same was sold to the defendant no.2. Learned counsel appearing for the defendant no.2 is unable to demonstrate before this Court as to how the said concurrent finding of the fact rendered by both the Courts below is perverse and contrary to Section 22 of the Hindu Succession Act, 1956.

61. There is no dispute that the plaintiff had already deposited the entire amount before the trial Court which was mentioned in the sale deed executed by the defendant no.1 in favour of the defendant no.2.

62. In so far as the reliance is placed by the learned counsel for the defendant no.2 on Section 29 of the said Fragmentation Act is concerned, in my view, the said provision which provides for “transfer of encumbrances” does not apply to the facts of this case even remotely.

63. In so far as the submission of the learned counsel for the defendant no.2 that the compensation for exercising right of pre-emption could be decided only by the Collector under Section 12 of the said Fragmentation Act is concerned, in my view, there is no merit in the submission of the learned counsel for the defendant no.2. The Collector can exercise power to determine the compensation only if any owner of a fragment transfers such land to the State Government. In this case, there was no transfer of a fragment to the State Government. The said provision relied upon by the learned counsel for the defendant no.2 is totally misplaced.

64. In this case, the Lower Appellate Court has considered the sale price mentioned in the sale deed executed between the defendant nos.1 and 2. Admittedly, after fixing the amount of compensation payable by the plaintiff to the defendant no.2, such amount has been admittedly deposited by the plaintiff before the trial Court. Since there was no dispute about the sale price mentioned in the sale deed at which the defendant no.1 had sold his share in the property in favour of the defendant no.2, in my view, the Lower Appellate Court was justified in fixing the compensation at the same amount. No prejudice has been thus caused either to the defendant no.1 or the defendant no.2. In my view, powers exercised by the Lower Appellate Court for fixing such compensation could be exercised by the Lower Appellate Court under the provisions of the Code of Civil Procedure, 1908 and more particularly under Order XLI Rule 33 which powers are very wide powers. The Lower Appellate Court had powers to modify the decree passed by the learned trial Judge. In my view, there is thus no merit in

the submission of the learned counsel for the defendant no.2 that the Lower Appellate Court could not have fixed any amount of compensation for the first time in the appeal filed by the defendant no.2.

65. In so far as the judgment of this Court in the case of *Ashok Yeshwant Dhumal (deceased) through LR's. (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, this Court has held that jurisdiction of Civil Courts is barred by Section 36-A of the said Fragmentation Act. In my view, since in this case, there was no dispute that there was a fragmentation of land, the learned trial Judge had rightly decided the said issue. The judgment of this Court in the case of *Ashok Yeshwant Dhumal (deceased) through LR's. (supra)* relied upon by the learned counsel for the defendant no.2 thus would not assist the case of the defendant no.2.

66. A perusal of the written statement filed by the appellant herein before the learned trial Judge clearly indicates that various issues of jurisdiction raised by the appellant before this Court across the bar were not raised in the written statement filed by the appellant herein.

67. In so far as the judgment of the Supreme Court in the case of *Gundaji Satwaji Shinde (supra)* relied upon by the learned counsel for the defendant no.2 is concerned, the said judgment is delivered by the Supreme Court under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. It has been held by the Supreme Court that whether the plaintiff was an agriculturist or not, was the issue which

could be conclusively decided by the Mamlatdar's Court and the jurisdiction of the Civil Court is ousted. In this case, since there was no issue raised or there was no dispute that the balance area of the land was fragment land, the Civil Court was not required to refer that issue to the competent authority for adjudication. The judgment of the Supreme Court in the case of *Gundaji Satwaji Shinde (supra)* relied upon by the learned counsel for the defendant no.2 thus would not assist the case of the defendant no.2.

68. For the reasons recorded aforesaid, the substantial question of law formulated in paragraph (c) is answered in negative. The substantial questions of law formulated in paragraphs (d) (e) and (f) are answered in affirmative. In so far as the substantial question of law formulated in paragraph (g) is concerned, the same is answered in negative. In my view, Section 22 of the Hindu Succession Act, 1956 was applicable to the facts of this case and the plaintiff was entitled to exercise the right of pre-emption under Section 22 of the Hindu Succession Act, 1956. In my view, both the Courts below rendered concurrent findings of facts which are not perverse and thus cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. Appeal is totally devoid of merits.

69. I therefore pass the following order :-

- (i) Second Appeal No.450 of 1993 is dismissed;
- (ii) There shall be no order as to costs.

R.D. DHANUKA, J.