**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**
**BENCH AT AURANGABAD.**

**SECOND APPEAL NO. 521 OF 2016**

Vilas S/o. Shivmurti Munde
Age : 57 years, Occu. Agriculture,
R/o. Wadgaon (Jahagir), Tq. Kallam,
Dist. Osmanabad. ….Appellant
(Orig. Plaintiff)

Versus

1. Somnath S/o. Santram Kumbhar
   Age : 57 years, Occu. Service,
   R/o. Yedshi, Tq. & Dist. Osmanabad.

2. Sou. Nilawatibai W/o. Bhagwanrao Barkul,
   Age : 63 years, Occu. Household,
   R/o. Yermala, Tq. Kalla,
   Dist. Osmanabad.

3. Sou. Malanbai W/o. Bhimrao Magar,
   Age : 62 years, Occu. Household,
   R/o. At Waruda, Post Upla (Makdache),
   Tq. & Dist. Osmanabad. Respondents...
   (Orig. Defendants)

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Mr Sanjay A. Wakure, Advocate for the appellant
Mr J. R. Patil, Advocate for respondent No. 1
Mr A. B. Tele, Advocate for respondent Nos. 2 and 3

………….

**CORAM : A. M. DHAVALE, JJ.**

DATE OF RESERVING THE JUDGMENT : 27TH NOVEMBER, 2018.
DATE OF PRONOUNCING THE JUDGMENT : 6TH DECEMBER, 2018.

**<u>JUDGMENT</u>** :-

1. This is an appeal by the original plaintiff.

2. The appellants had filed Spl. Civil Suit No. 67/1996 later on numbered as R.C.S. No. 517/2000 in the court of Jt. Civil Judge,

Jr. Divn., Kallam, Dist. Osmanabad. According to the appellant-orig. Plaintiff, there was partition between his grand-father Krishna and his brother Devidas. Krishna's share was inherited by Tulshiram, Shivmurti, Manohar and Manik. Share of Devidas was inherited by his two daughters Malanbai and Nilawatibai, who are defendants No. 1 and 2. Tulshiram had sold his share to one Vishwas Shivajirao Patil. Said share was subsequently purchased by plaintiff -Vilas. The said share was adjacent to the share of Devidas. Defendants no. 1 and 2 executed two sale deeds dt. 04.05.1995, whereby a) Gat No. 121, admeasuring about 2 H. 20 R., assessed at Rs. 6 = 75 b) Gat No. 28, admeasuring about 1 H. 8 R., assesed at Rs.3=00 and c) Gat No. 130, admeasuring about 1 H. 37 R. assessed at Rs. 4=27. were sold to defendant No.3. As per plaint, on 22.11.1978, Consolidation Scheme was implemented in village Wadgaon (Jahagir). The lands sold by defendants No. 1 and 2 were fragments in terms of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as 'Fragmentation Act'). Sale thereof was banned except to the owner of contiguous land. Still, defendants No. 1 and 2 with ulterior motive, sold the suit land to defendant No. 3 and thereby preferential right of the plaintiff was infringed. Besides, defendant No. 3 was not an agriculturist and was not eligible to purchase the land. Defendant No. 3 contested the suit. He denied the contents. He also denied that, lands sold were fragments. He also contended that the entire lands inherited by defendants No. 1 and 2 were sold and therefore there was no bar to the sale. They denied that the plaintiff was having preferential right to purchase the land. Defendants No. 1 and 2 denied that there was any consolidation of holdings or fresh allotments of land. According to them, their old land bearing survey numbers were simply converted into gut numbers (block number). They denied the plaintiff's right of preemption. The learned Civil Judge framed the issues and held that the sales were hit by Section 7(1) of the Fragmentation Act. He held that, the plaintiff had preferential right. He partly decreed the suit in respect of sale of 54R. land from Gut No. 28 and 69R. land from Gut No. 130. The sale deeds in respect of those sales were declared null and void. Accepting the plaintiff's case of preferential right, the Collector was directed to fix the compensation. The suit with respect to land of 1H 12R. from Gut No. 21, was dismissed.

3. Aggrieved defendants preferred RCA No. 59/2009. The ld. Principal District Judge, Osmanabad framed points for determination as per Section 41 Rule 31 and held that, as the entire lands were sold, as per Section 31(3), the bar under Fragmentation Act was not attracted. He allowed the appeal and set aside the judgment and dismissed the suit.

4. Heard Mr Sanjay Wakure, learned advocate for the appellant and Mr J. R. Patil, learned counsel for respondent No. 1 and Mr A. B. Tele, learned advocate for respondents No. 2 and 3. The second appeal is admitted by framing substantial questions of law as follows:

1. Whether the suit for the prayers as made was maintainable?
2. Whether both the lower courts erred in ignoring the provisions of Section 36A of Fragmentation Act?
3. What order?

5. I answer the above questions as follows:

Question No. 1 - In the negative.

Question No. 2 – In the affirmative.

Question No. 3 – The appeal is partly allowed. The judgment and decree of both the courts below are set aside and the plaint is rejected.

6. Mr Wakure, learned advocate for the appellant submitted that, plaintiff was claiming preemption right both u/s 22 of the Hindu Succession Act as well as u/s 10 of the Fragmentation Act. However, on going through the facts referred to herein above which need not be repeated again, it is apparent that, no claim was made u/s 22 of the Hindu Succession Act. The plaintiff and defendants are

not Class-I legal heirs of any person. In fact, the plaintiff has purchased land with the intervention of third person. The sale to said third person was not challenged. There are neither pleadings nor evidence to consider the claim of preemption u/s 22 of Hindu Succession Act.

7. The pleadings disclose that, the plaintiff's claim is under the Fragmentation Act.

8. The relevant provisions of the Fragmentation Act are as follows:

> ***S.6*** ***Entry in the Record of Rights:*** *(1) On notification of a standard area under sub-section (3) of section 5 for a local area all fragments in the local area shall be entered as such in the Record of Rights or where there is no Record of Rights in such village record as the State Government may prescribe.*
>
> *(2) Notice of every entry made under sub-section (1) shall be given in the manner prescribed for the giving of notice ' [in the Hyderabad area of the State, under the Hyderabad Record of Rights in Land Regulation, 1358 Fasli and elsewhere, under the relevant Code,] of an entry in the register of mutations.*
>
> ***S.7.*** ***Transfer and Lease of Fragments:*** *(1) No person shall transfer any fragment in respect c which a notice has been given under sub-section (2) of section 6 [1][except to the owner of] contiguous survey number or recognised sub-division of a survey number :*
>
> *[2][Provided that the holder of such fragment may mortgage or transfer it to the State Government or a land mortgage bank or any other co-operative society as security for any loan advanced to him by the State Government or such bank or society, as the case may be].*
>
> *(2) Notwithstanding anything contained in [3][any law for the time being in force or in any instrument or agreement], no such fragment shall be leased to any person other than a person cultivating any land which is contiguous to the fragment.*

***S.8: Fragmentation prohibited:***
*No land in any local area shall be transferred or partitioned so as to create a fragment.*

***S. 8A.*** *Sections 7 and 8 not to apply to transfer for public purpose: Nothing in Sections 7, [8 and 8AA] shall apply to a transfer of any land for such public purpose as may be specified in this behalf by the State Government by notification in the Official Gazette.]*

***S.8AA*: *Restriction on partition of land*** *(1) Where, by transfer, decree, succession or otherwise, two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed and the land has to be partitioned among them, such partition shall be effected so as not to create a fragment.*

*(2) Where such partition is made by the Court or the Collector, the following procedure shall be adopted:-*

*(a) If, in effecting a partition among several co-sharers, it is found that a co-sharer is entitled to a specific share in the land and cannot be given that share without creating a fragment, he shall be compensated in money for that share. The amount of compensation shall be determined so far as practicable in accordance with the provisions of section 23 of the Land Acquisition Act, 1894.*

*(b) If, in effecting a partition, it is found that there is not enough land to provide for the shares all the co-sharers in accordance with provisions of sub-section (1), the co-sharers may agree among themselves as to the particular co-sharer or co-sharers who should get the share of land and which of them should be compensated in money. In the absence of any such agreement, the co-sharers to whom a share of land can be provided and those to whom money compensation should be given shall be chosen by lot in the manner prescribed.*

*(c) The compensation shall be payable by each co-sharer in proportion to the excess value of land he gets over the share of land legally due to him, and such co-sharer shall deposit the proportionate amount of compensation in the manner prescribed before taking possession of the share allotted to him. On his failure to do so, his share shall be allotted to any other co-sharer to whom land has not been previously allotted and who is chosen in the manner provided in clause (b) subject to the payment of similar compensation to the co-sharers not getting shares of land.*

*(d) If none of the co-sharers to whom land has been allotted under clause (c) pays the compensation and takes the share, the share shall be sold in auction to the highest bidder, and the purchase money shall be paid to the co-sharers not getting land in proportion to their respective shares.*

*(e) Where the parties agree upon any other method of partition which will not result in the creation of a fragment, that method shall be followed in effecting partition.*

*(3) Where a partition is effected in execution of a decree all questions relating to the partition of the land and apportionment of compensation shall be decided by the Court executing the decree or by the Collector effecting the partition, as the case may be, in accordance with the provisions of sub-section(2).]*

***S. 9. Penalty for transfer or partition contrary to provisions of Act:*** *(1) The transfer or partition of any land contrary to the provisions of this Act shall be void.*

*(2) & (3) – not relevant.*

***S.10. Transfer of Fragment to [Government]:*** *(1) Any owner of a fragment may transfer it to the [2][State Government] on [3][payment by the State Government] of such compensation to persons possessing interest therein as the Collector may determine and thereupon the fragment shall vest absolutely in the [2][State Government] free from all encumbrances [4][but no such fragment shall be transferred to the State Government unless it is first offered to the owner of a contiguous survey number or recognised sub-division of a survey number on payment of the compensation determined by the Collector as aforesaid and such owner has refused to purchase the fragment on payment of such compensation.]*

*(2) Any such fragment may be disposed of in accordance with the provisions of section 117B of the Bombay Land Revenue Code, 1879* [5][or section 158 of the Madhya Pradesh Land Revenue Code, 1954* or as the case may be, may be disposed, of as unoccupied land under the provisions of the Hyderabad Land Revenue Act, 1317 Fasli.]*

9. The newly added proviso grants rights to the Collector to regularize the transfers or partition of land contrary to the provisions of the Act made after 15.11.1965. Sections 7 & 10 are relevant. Section 8 prohibits any transfer or partition which would create a fragment. Section 7 declares that, any transfer of fragment in respect of which <u>a notice has been given under sub-section 2 of Section 6 is prohibited except to the owner of contiguous survey number or recognized sub-division of a survey number</u>. Section 10 provides right to a fragment holder to sell their fragment to the Government

on payment of such compensation as the Collector may determine but, the State Government cannot claim such land without first offering the said land to the contiguous survey number or recognized sub-division of survey number. These provisions have been considered by the plaintiff as right of preemption.

10. In ***Mallu Tatya Suryavanshi v. Shripati Rama Gondhali and others*** reported in [1995(1) Mh.L.J. 816], it is laid down that no right of preemption by vicinage is conferred by the Act. Section 9 of Fragmentation Act provides for; in case of transfer of fragment, if any contiguous owner wants to claim the benefit of purchasing the said land by virtue of contiguous owner, he may file application u/s. 10 of Fragmentation Act before the Competent authority. There may be several owners of contiguous lands. No owner of a contiguous lands has right of preemption.

11. In the light of the claim made by the plaintiff, the following questions arise.

i. Whether there was notification declaring the land of the defendants as fragments?

ii. Whether the lands of the defendants No. 1 and 2 were fragments?

iii. Whether the sale of the defendants lands were hit by the provisions of Fragmentation Act?

iv. Whether the lands should be sold to the plaintiff or to any other adjacent holder of the land?

12. All these questions are required to be decided by the competent authority under the Act. The jurisdiction of the civil court in this regard is barred u/s 36A of the Fragment Act, which reads as follows:

> **36A. Bar of jurisdiction.**
>
> (1) No Civil Court or Mamlatdar's Cort 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.

13. No doubt, Section 36(B) provides that, when any issue requires to be decided under the Act is raised in any suit instituted in civil court or Mamlatdar's court, which requires settlement, decision or dealing with by the competent authority under the Act, such issue must be referred to the competent authority for determination.

14. Section 36(B) would come into picture when the plaintiff is claiming rights which can be partly granted by the civil court and partly by the competent authority. If claim made by the plaintiff can be granted only by the competent authority under the Act, then Section 36(B) would not be applicable and Section 36A would be

applicable. Considering the nature of dispute raised by the plaintiff, I find that, the plaintiff had no civil right to claim as of right transfer of the fragments to himself in view of the vicinage and, therefore, in absence of civil right, the civil suit itself was not maintainable. The suit was barred by Section 36A of the Fragmentation Act. He could have approached the competent authority by way of application u/s 10 of Fragmentation Act. Similarly, other contiguous owners could have also approached the competent authority u/s 10, then the competent authority was bound to consider whether lands sold by defendants No. 1 and 2 were fragments or not. If these findings would have been in the affirmative, then the competent authority could have taken subsequent action as contemplated under the law.

15. Reliance was placed in ***Ashok Yeshwant Dhumal vs. Shankar Maruti Dhumal*** reported in *2001(3) Bom.C.R. 27* with respect to bar of Section 36A of the Fragmentation Act but, the nature of relief claimed in that suit was different.

16. In ***Jairam Baban Makode vs. Bhagirathabai Mitharam Patil & Ors.*** reported in *2005 (2) ALL. M.R. 360*, this Court (Nagpur Bench) held that, unless and until the land is notified as fragment as contemplated u/s 6(2) of Fragmentation Act, Section 7 cannot be pressed into service. Section 6(2) prescribes for notice of every entry

made under sub-section 1 and then only Section 7 will come into picture. This view has arisen out of the proceedings initiated before the competent authority under the Consolidation Act and not before the civil court. Hence, the civil court cannot take into consideration these judgments.

17. Reliance was placed on ***Putalabai w/o. Kakhu Pawar vs. Shiva Dhondi Pawar & Ors.*** reported in *1980 Mh.L.J. 547*, wherein it is held that bar of Section 31 is not attracted if the entire holdings is sold or where the holdings was not allotted under the Fragmentation Act. It is also held that, bar of Section 7(1) is attracted only when notice u/s 6(2) is given. Reliance was placed on ***Janglu Pandurang Mali v Shahaji Narayanrao Mali*** reported in *2009(2) Mh.L.J. 578*. In that case, the suit was for specific performance of the contract and the defence was raised that it cannot be specifically performed in view of creation of fragment. In that case, it was held that, in view of Section 31(3) of Fragmentation Act, no permission was necessary. However, it may be stated that, in Mallu's case (supra), the Division Bench of this Court at Principal Seat held that, the transfer of fragment would be hit by Section 7 and such bar will not be saved by provisions of Section 31(3) of the Fragmentation Act. These rulings are not applicable to the facts of this case.

18. Considering the peculiar facts of the present case, I find that, the case before me is absolutely governed by the provisions of Section 36A of the Fragmentation Act and the learned trial Judge had no jurisdiction to decide, entertain and try the suit. It was not even a case where civil court could have granted any relief after referring the special issue to competent authority and after receiving the findings thereon.

19. Both the courts below considered the provisions of Fragmentation Act but not in its entirety. The bar of jurisdiction of civil court is not considered and the matters were decided by them in the assumed jurisdiction not vested with them. Hence, I answer the substantial questions of law framed accordingly and hold that, formal interference in the judgment of the dismissal by the ld trial Judge is necessary.

20. Instead of dismissal of suit, the plaint deserves to be rejected under Order 7 Rule 11 of CPC.

21. Hence, the appeal is partly allowed. The judgment and decree of both the courts below are set aside. The plaint in the original suit being R.C.S. No. 517/2000 (Old Spl. Civil Suit No.

67/1996) is rejected under Order 7 Rule 11 CPC. In the peculiar facts, no order as to costs. Parties to bear their own costs.

**[ A. M. DHAVALE ]**
**JUDGE**

Punde