

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

SECOND APPEAL NO. 145 OF 2014

Chandrasen s/o. Rama Barve,
Aged 62 years, Occ. Agriculture,
R/o. Wanjarwadi, Tal. Bhoom
Dist. Osmanabad.

.. Appellant
[original
plaintiff]

Versus

1. Sheshrao s/o. Rangnath Mote,
Aged 62 years, Occ. Agriculture,
2. Ankush s/o. Sopan Dombale,
Aged. 55 years, Occ. Agriculture,
3. Dhanaji s/o. Pandurang Barve,
Aged. 49 years, Occ. Agriculture,
4. Dipak s/o. Pandurang Barve,
Aged. 49 years, Occ. Agriculture,
R/o. Wanjarwadi, Tal. Bhoom,
Dist. Osmanabad.
5. Dnyanoba s/o. Rama Barve (died)
Through LR's.

.. Respondent
Nos.1 to 4
[Ori. Def. Nos.
2 to 5]

- 5-A. Sitabai wd/o. Dnyanoba Barve,
Aged. 71 years, Occ. Household
R/o. Wanjarwadi, Tal. Bhoom,
Dist. Osmanabad.

[Res.Nos.5A to
5G are formal
parties]

- 5-B. Mukund s/o. Dnyanoba Barve,
Aged. 40 years, Occ. Agriculture,
R/o. Wanjarwadi, Tal. Bhoom,
Dist. Osmanabad.

- 5-C. Mangal w/o. Navnath Hake,
Aged. 37 years, Occ. Household,
R/o. Malewadi, Tal. Kaij,
Dist. Beed.
- 5-D. Sunita w/o. Ashok Harale,
Aged. 41 years, Occ. Household,
R/o. Awati, Tal. Karmala,
Dist. Solapur.
- 5-E. Sunita w/o. Balu Thavare,
Aged. 42 years, Occ. Household,
- 5-F. Changubai d/o. Dnyanoba Barve,
Aged. 36 years, Occ. Household.
- 5-G. Reshma d/o. Dnyanoba Barve
Aged. 24 years, Occ. Household.
[Respondent Nos. 5-E to 5-G
R/o. Wanjarwadi, Tal. Bhoom,
Dist. Osmanabad.

Ms.PS. Talekar h/f. Mr. S.B. Talekar, Advocate for the appellant.

Mr.Nikhil S. Tekale a/w. Ms. Sayali S. Tekale, Advocate for the respondents.

CORAM	:	KISHORE C. SANT, J.
RESERVED ON	:	24.08.2023
PRONOUNCED ON	:	26.10.2023

ORDER :-

01. This is a Second Appeal arises out of the proceedings filed by the appellant/original plaintiff for enforcement of right of pre-emption under section 22 of the Hindu Succession Act, 1956 [hereinafter referred to as “the

Act”] against present respondents/original defendants. The suit bearing Regular Civil Suit No.24 of 1992 was decreed by judgment and order dated 05.07.2004. The said judgment and decree came to be set aside by the learned District Judge-1, Osmanabad in Appeal bearing Regular Civil Appeal No.72 of 2004 preferred by the present respondent Nos. 1,2,3 and 4, who are original defendant Nos.2 to 5, setting aside judgment and decree passed by the Trial Court and thereby dismissed the suit.

02. The facts giving rise to the present appeal are summarized as below. The parties are referred as per their original status in the suit :-

. The plaintiff and original defendant No.1 now represented by respondent No.5A to 5G were real brothers. Defendant No.1 sold his land to defendant Nos.2 and 3. It is case of the plaintiff that the land Survey No.3/B admeasuring 1 Hectare 70 R at Wanjarwadi, Tq. Bhoom was owned by one Rama Dhula Barve, who received the said property in oral partition along with Survey No.23/A. Rama was having 65 Acres of land and he had three daughters and four sons. He died in 1969. Rama and four sons were having joint family property. The land of Rama was partitioned amongst four sons.

Plaintiff, defendant Nos.1, 4 and 5 each received 41 ½ R land and mutation entries were taken in their names. Defendant No.1 wanted to sell the land. The plaintiff, therefore, offered him that he is ready to purchase the land. Defendant No.1, however, without knowledge to his brothers sold the land to defendant Nos.2 and 3 on 10.04.1989 for Rs.10,000/- and executed the sale-deed. Even after the sale-deed, defendant No.1 was having possession over the land for 2 ½ years. The plaintiff, therefore, could not get knowledge of the sale-deed. In Diwali, 1991, defendant Nos. 2 and 3 started taking crop. On that the plaintiff came to know that the land is sold to defendant Nos.2 and 3. From the office of Sub-Registrar, he got the certified copy of the sale-deed on 23.12.1991. On this, he filed suit for enforcement of right of pre-emption.

03. The Trial Court accepted that the plaintiff and defendant Nos.1,4 and 5 are Class-I heirs of Rama Dhula and decreed the suit by judgment and decree dated 05.07.2004. The defendants were directed to execute a sale-deed in respect of the suit land in favour of the plaintiff on accepting amount of Rs.10,000/- and to hand over the possession.

04. The learned District Judge set aside the findings recorded by the Trial Court holding that Bajirao Rama was shown as Karta of the joint family and his name was entered in the 7/12 extract as Karta of the family in 1977. Bajirao filed application with the Revenue Authority on making partition of the land between himself and three brothers. An entry was taken bearing Mutation Entry No.410 to that effect and names of all three brothers were recorded in the revenue record as per the said partition. The mutation entry sanctioned on 22.11.1986 is not challenged by the plaintiff or other brothers. The learned District Judge considered section 22 of the Act. The learned District Judge relied upon judgment in the case of **Jeewanram Vs.Lichmadevi, AIR 1981 Rajasthan 16.** It is held in the said judgment that section 22 is applicable only to the business and immovable property which does not include agricultural land. It is further held that after partition takes place amongst heirs, right under section 22 ceases to exist and allowed the appeal by its judgment and order dated 16.11.2013.

05. The facts in this case are not disputed. The question is only as to whether section 22 of the Act is applicable in the present case and whether the plaintiff has right of pre-emption. For that purpose Section 22 of the Act

needs to be considered, which reads as under :-

“Section 22. Preferential right to acquire property in certain cases :-

(1) Where, after the commencement of this Act, interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolve upon to two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation. - In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

Submission of learned Advocate for the appellant/original plaintiff.

06. The appellant/original plaintiff is admittedly class-I heir of deceased Rama Barve, father of defendant Nos.3 and 4 and grand father of original defendant No.1 Dnyanoba, who is now represented by respondent Nos.5A to 5 G. The Trial Court has rightly accepted that plaintiff and

defendant Nos. 2 to 5 being class-I heirs of Rama, the plaintiff has right to purchase the property and other defendants by pre-emption, as per section 22 of the Act. The Trial Court had rightly decreed the suit. The learned District Judge, however, only by relying upon mutation entry in the revenue record accepted that there was already a partition between all the sons of Rama. The defendant could not prove the partition.

Submissions of the respondents/original defendants.

07. The learned Appellate Court has rightly appreciated that the property was no more a joint family property since the partition had already taken place. It is rightly accepted that the partition had occurred in the year 1972 and once the partition has occurred, there is no question of right of pre-emption. When the sale-deed was executed in favour of defendant Nos.2 and3, the plaintiff was very much present. The plaintiff never objected to the execution of the sale-deed, though it was within his knowledge and therefore no case is made out showing right of pre-emption with the plaintiff. The Trial Court did not properly consider this fact and decreed the suit. There is no need to set aside the Appellate Court's judgment. The judgment is well reasoned judgment. No illegality is committed by the learned Appellate

Court. No substantial question of law is involved and appeal deserves to be dismissed. The learned Advocate invited attention to the mutation entry No.410 from the record. From Mutation Entry No.410 at Exh.109, it is clearly seen that there was partition between Chandrasen, Dnyanoba, Pandurang and Bajirao all sons of Rama Barve. Chandrasen is put in possession of 4 H 42 R. All other brothers are put in possession of 3 H 22 R each. This entry is taken on 17.10.1986. Though it was stayed for some time by the Tahsildar, later on in view of decision dated 22.11.1986 the mutation was sanctioned. It is specific case of the defendants that oral partition had taken place and on the basis of that mutation entry No.410 was taken. On these main submissions both the parties have relied upon certain judgments in support of their case.

Judgments cited by the parties.

08. The learned Advocate for the appellant relied upon judgment in the case of :-

(i) Babu Ram Vs. Santokh Singh (deceased) through its Legal Representatives and Others, (2019) 14 SCC 162.

(ii) Mahadu Appa Wanjole Vs. Laxman Veerappa Wanjole & Ors., 2008 (5) Mh.L.J. 680.

09. The learned Advocate for the respondent has relied upon

following judgments :-

(i) H. Vasanthi Vs. A. Santha (dead) through LRs. And Ors., (Hon'ble Supreme Court – Civil Appeal No.7374 of 2008)

(ii) Aloki sd/o. Anandrao Idre & Ors. Vs. Gajanan Lahanuji Idre & Anr., 2015(3) Mh.L.J. 233.

(iii) Kailashchandra Vs. Damodar, LAWS(MPH)-2019-10-275.

10. In the case of **Babu Ram (Supra)**, the Hon'ble Apex Court considered scope and applicability of Section 22 of the Act to agricultural land. It is held that the preferential right given to heir of a Hindu under section 22 of the Act is applicable, even if the property in question is an agricultural land. It was held in the said judgment that the High Court was right and confirmed the judgment and decree passed by the learned District Judge in that case. The decisions of the High Court, which are contrary were overruled. The question in that case was as to whether section 22 of the Act has application where the property is agricultural land and said question was answered in the affirmative.

11. In the case of **Mahadu Appa Wanjole (Supra)**, this Court had held that mutation entry is not a conclusive proof of partition. The mutation entry

in absence of other evidence would not amount to a document to prove the partition.

12. On going through the judgment relied upon by the respondents in the case of H. Vasanthi (Supra), it is seen that the Hon'ble Apex Court was dealing with the dispute about partition. It was a case that the plaintiff and defendant Nos.1 and 2 had entered into partial deed of partition on 24.02.1980. The plaintiff after getting married filed a suit. She accepted the earlier partition and claimed partition of the remaining property. After her marriage defendant Nos.1 and 2 entered into agreement to sale of unpartitioned property in favour of defendant No.3. This defendant No.3 had filed a suit for specific performance and that was granted.

13. It was her case that she got status as coparcener with effect from 25.03.1989 and therefore the rights were not disturbed by decree in Appeal No.165 of 1984. It was case of the plaintiff that the properties were thus available for partition. The suit of the plaintiff was dismissed before the High Court. The Hon'ble Apex Court considered the crucial circumstance as to whether the suit property had status as coparcenary property and whether

same was available for partition. It was held by the High Court that the property was not available for partition as on the date of coming into force section 29-A of the Act, which gave right to the plaintiff as coparcener and dismissed the appeal. The Hon'ble Apex Court held the plaintiff's position as a coparcenary member. However, further held that by itself would not be a reason to accept the prayer for partition. It was held that the plaintiff failed to demonstrate that the property continued to be coparcenary property available for partition. It is held that it was for the plaintiff to establish that the property was available for partition. In other words, the property was a joint family property.

14. Coming to the case of Aloki (Supra) this Court held in the facts that the ancestral property was partitioned after death of one Lahanu in the year 1957. The parties were put into possession of their respective share. The defendant therein sold field on 27.02.1996 much after the partition. The plaintiff filed a suit claiming preferential right to purchase the said land in view of section 22. The defence of the defendant was that defendant No.1 was absolute owner of the suit property and he was legally entitled to sale the same to defendant No.2. The Trial Court decreed the suit holding that the

plaintiff had preferential share. The Appellate Court reversed the judgment holding that the plaintiff had no preferential right. This Court. Also considered the term intestate defined in section 3(9) of the Act as under :-

“ “intestate” a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect.”

. On considering all these aspects it was held that the preferential right was claimed as regards property allotted to defendant No.1 in partition and therefore the requirement of section 22(1) of the Act was not satisfied.

15. In the case of Kailashchandra (Supra), the Madhya Pradesh High Court considered somewhat similar situation and held that after obtaining share in partition, the defendant had become absolute owner and the plaintiff had no right of pre-emption under section 22 of the Act.

16. In the light of these judgments, this Court finds that though the mutation entry itself cannot be taken as a sole proof of partition, in this case, it is seen that the said mutation entry was taken in the year 1986. There is no case of the plaintiff that it was ever disputed. All the parties have acted upon the partition. This Court, therefore, holds that there was partition and each of

the brother had become absolute owner of the property of his share. The Hon'ble Apex Court in the case of **Babu Ram (Supra)** held that the right of pre-emption is available even in the case of agricultural land. It is clear that the agricultural land is not excluded from operation of section 22 of the Act. However, the plaintiff would not be entitled as he has not satisfied all the requirements under section 22(1) of the Act, as the property stood partitioned long back and each of the defendants and plaintiff had become absolute owner to the extent of their share. This Court holds that therefore the finding about partition recorded by the District Court does not require any interference at the hands of this Court, as the same cannot be said to be perverse or based on no evidence. This Court need not interfere with the findings of fact, when not perverse and are based on the evidence. This Court, therefore, finds that no substantial question of law is involved.

17. In the result, as no case is made out to admit the appeal, the Second Appeal stands dismissed with no order as to costs.

[KISHORE C. SANT, J.]