



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

SECOND APPEAL NO.124 OF 1993

**LAXMAN RAM BIRADAR AND OTHERS
VERSUS
MAHADU S/O RAM BIRADAR AND ANOTHER**

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Mr. V. C. Solshe, Advocate for Appellant Nos.1, 2A to 2D and 3A to 3F.

Mrs. Rekha Choudhary h/f Mr. S. S. Choudhary, Advocate for Respondents Nos.1, 2A to 2F.

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**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 25th MARCH, 2025.**

ORDER:-

1. The appellants/original plaintiffs filed present Second Appeal impugning judgment and decree dated 07.07.1992 passed by District Judge, Latur in Regular Civil Appeal No.176/1985, by which judgment and decree dated 30.07.1985 passed by Civil Judge, Junior Division, Nilanga in Regular Civil Suit No.62/1979 has been confirmed. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. While Second Appeal was admitted, no specific substantial question of law was framed. Therefore, learned Advocate appearing for appellants was permitted to file separately carved out substantial questions of law vide order dated 12.06.2024. The learned Advocate appearing for appellant submitted substantial questions of law on 20.06.2024, which reads thus:

1. Whether both the Courts below were right in law to hold that there was partition in 1955 between plaintiffs and defendant No.1 on the basis of 7/12 extract and mutation entry when admittedly both the plaintiff No.1 and defendant No.1 were minors at the time of recording the said entries?
 2. Whether both the Courts below failed to appreciate that the partition has to be between all the family members and there has to be an intention to separate?
 3. Whether both the Courts below failed to give effect to the compromise pursis filed below Exh.21 between the plaintiffs and defendant No.1, which also shows that there was no earlier partition between the plaintiffs and defendant No.2?
 4. Whether both the Courts below erred in law by rejecting the rights of plaintiff No.1 to purchase the share of defendant No.1 u/s 22 of the Hindu Succession Act, 1956?
3. Today learned Advocates appearing for respective parties advanced submissions on aforesaid substantial questions of law.
4. In nutshell, facts giving rise to present Second Appeal are as under:

The appellants/original plaintiffs instituted Regular Civil Suit No.62/1979 against respondents/defendants seeking decree of partition and separate possession. According to plaintiffs, suit properties were originally owned by Ram. He died leaving behind plaintiffs and defendant no.1 as his legal representatives. The plaintiff no.1 and defendant no.1 are sons of Ram, plaintiff nos.2 and 3 are daughters and plaintiff no.4 is widow. The defendant no.6 is purchaser of suit property from defendant no.1 vide registered sale deed dated 01.03.1979. According to plaintiffs, suit property is joint family property of plaintiffs and defendants. After death of Ram, name of plaintiff no.1 and defendant no.1 was mutated in revenue record on 14.06.1958. However, property was jointly owned by plaintiffs and defendant no.1. According to plaintiffs, son of defendant no.1 was seriously ill and later on he died. The defendant no.1 was under mental shock. The defendant no.2 taking advantage of his situation got executed register sale deed dated 01.03.1979 out of Survey No.8(a) admeasuring 2 acres 25 guntas. According to plaintiffs, defendant no.1 had no right to alienate suit property. The plaintiffs are entitled to exercise right of preemption under Section 22 of the Hindu Succession Act.

5. The defendant no.2 contested suit by filing written statement and pleaded that there was previous partition between plaintiffs and defendant no.1. The defendant no.1 was exclusive owner of

suit property. The mutation entry clearly depicts his individual share. The plaintiffs cannot have right of preemption in view of previous partition. The suit is false. During pendency of suit, plaintiff no.4 died. The plaintiffs and defendant no.1 placed on record compromise pursis at Exhibit-21, which suggests that there was partition between plaintiff no.1-Laxman and defendant no.1-Mahadu.

6. The Trial Court framed issues, recorded evidence and concluded that plaintiffs failed to prove their case. Eventually, dismissed the suit. The plaintiffs filed Appeal before District Judge, Latur, which came to be dismissed vide judgment and order dated 07.07.1992. Hence, this Second Appeal.

7. Mr. Solshe, learned Advocate appearing for appellants submits that mutation entry could not have been considered as proof of partition between plaintiff no.1 and defendant no.1. Both Courts have erroneously recorded finding of previous partition contrary to the record and practically on the basis of assumption, presumption and surmises. He would further submit that compromise pursis passed below Exhibit-21 nowhere suggests previous partition. The right of plaintiff no.1 to purchase share of defendant no.1 under Section 22 of the Hindu Succession Act was very much available, but same has been declined on erroneous count that there was previous partition.

8. Mrs. Choudhary, learned Advocate appearing for respondents supports judgment and decree under Appeal. She would submit that there are concurrent findings of fact as to the previous partition. Those findings are based on appreciation of evidence and it is not open of appellants to challenge the same in Second Appeal.

9. Having considered submissions advanced, it can be observed that Trial Court as well as Appellate Court have concurrently recorded that there was previous partition between plaintiff no.1 and defendant no.1. In deference to such partition, mutation entry was effected in the year 1958. Perusal of mutation entry depicts that individual share of plaintiff no.1 and defendant no.1 to the extent of 8 anna is shown in mutation record. The 7/12 extract depicts that Laxman and Mahadu both were independently cultivating their lands to the extent of 50% share. Later on, defendant no.1 executed sale deed dated 01.03.1979 in favour of defendant no.2 for consideration of Rs.15,000/-. Accordingly, mutation entry no.396 was recorded in the name of defendant no.2 to the extent of 50% share possessed by Mahadu. Apart from aforesaid transaction, sale deed at Exhibit-83 shows that defendant no.1 had sold his land to brother of defendant no.2 under registered sale deed dated 19.06.1972. The plaintiff no.1-Laxman is witness to said transaction. There is no challenge to aforesaid sale deed, which stipulates that Mahadu is exclusive owner of property. The

combine reading of aforesaid evidence leaves no room of doubt that defendant no.1 was exclusively put into possession as owner of suit property on partition and he dealt with the same with consent and knowledge of plaintiff no.1-Laxman. Both the Courts have rightly appreciated aforesaid evidence and concluded that there was previous partition between plaintiff no.1 and defendant no.1. In addition to aforesaid fact, both Courts have relied upon compromise pursis at Exhibit-21 filed by plaintiff no.1 and defendant no.1, wherein it is mentioned that plaintiff no.1 and defendant no.1 have got half share in landed property as per partition effected between them. Although date of such partition is not mentioned in compromise pursis, fact remains that they admitted previous partition and separate ownership and possession.

10. So far as claim of plaintiffs to exercise right of preemption is concerned, evidently original owner Ram i.e. father of plaintiffs and defendant no.1 died prior to commencement of Hindu Succession Act. The property was devolved upon plaintiffs and defendant no.1 and they were separately cultivating the same. Even assuming that death of Ram was subsequent to commencement of Hindu Succession Act, in light of previous partition and consequential mutation entry of the year 1958, plaintiffs cannot exercise such right after 20 years of partition. In result, Second Appeal sans

merit. The substantial questions of law as framed do not survive for consideration. Hence, Second Appeal stands dismissed.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/March-2025