



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 319 OF 2022

Ahmed Manikbhai Sayyed (Attar).
Age: 67 years, Occ. Agril.,
R/o. Shahartakli, Tq. Shevgaon,
Dist. Ahmednagar.

.....APPELLANT
(Ori. Plaintiff)

VERSUS

1. Abidabee Yasin Sayyed (Attar),
Age: 72 years, Occ. Agril.,
2. Nashir yasin Sayyed (Attar),
Age: 47 years, Occ. Agril.,
3. Arif yasin Sayyad (Attar
Age: 40 years, Occ. Agril.,
4. Baby Dilawar Attar,
Age: 49 years, Occ. Agril.,

All R/o Nandur Road, Attar Vasti,
Tq. Rahuri, Dist. Ahmednagar.

5. Sangita Balasaheb Kharad,
Age: 32 years, Occ. Agril.,
R/o Deotakli, Tq. Shevgaon,
Dist. Ahmednagar.

.....RESPONDENTS
(Ori. Defendants)

Mr. R. R. Karpe, Advocates for appellant

CORAM : ROHIT W. JOSHI, J.

DATED : 04th APRIL, 2025

JUDGMENT :-

. The present appeal is filed under Section 100 of the Code of Civil Procedure in order to challenge judgment and decree dated 19.03.2014 passed by the learned Civil Judge Junior Division, Shevgaon in Regular Civil Suit No.482 of 2012 and the judgment and decree dated 21.07.2020 passed by the learned Ad-hoc District Judge-1, Ahmednagar, dismissing the appeal arising out of the aforesaid decree passed by the learned Trial Court. The appellant is the original plaintiff.

2. Parties will be referred in the judgment as plaintiff and defendants.

3. The plaintiff had filed Regular Civil Suit no.482 of 2012 seeking relief of partition and perpetual injunction and preemption with respect to the suit property, which is an agricultural land bearing gut no.189/1B2 (old survey no.100) admeasuring 1.28HR and gut no.189/2 admeasuring 1.21HR, both lands situated at village Deotakli Tahsil, Shevgaon, District- Ahmednagar. The father of the plaintiff, deceased Manikbhai and husband of the defendant no.1 Yasin were real

brothers. Both the brothers have expired. The defendant No.1 is paternal aunt of plaintiff. Defendant No.2 to 4 are children of defendant No.1 and as such cousins of plaintiff.

4. It is the case of plaintiff that land bearing gut no.189 (old survey no.100) admeasuring 2.49HR was allotted to Manikbhai and Yasin under a scheme for Rehabilitation of Project Affected Persons. The plaintiff claims that Yasin had taken the property on 02.06.1977. He then states that although, the property was simultaneously allotted, his father Manikbhai expired before depositing the nazrana/ consideration amount and thereafter, the plaintiff paid the nazrana / consideration and got the property on 25.03.1983. The plaintiff claims that he is owner of 1.28HR land and defendants are owners of 1.21HR. According to the plaintiff, the properties are not separately demarcated. Although, according to him, the defendants are in occupation of western side road facing portion of the land and eastern side portion is in possession of plaintiff. The plaintiff states that there is a North-South Dhura/Bandh, which is wrongly laid by the defendants. According to him, the Bandh should be in East-West direction, so that both parties can have direct access to

the road, which passes along the western boundary of gut no.189.

5. It is the contention of the plaintiff that the defendants intended to sell the suit property i.e. portion of gut no.189/2, which is in their possession. The plaintiff claims that since the lands are not demarcated and plaintiff and defendants are family members, the plaintiff has right to seek preemption. It is contended that it was not open for the defendants to sell the property to any third person. The plaintiff also claimed relief of partition and separate possession and perpetual injunction restraining the defendants from selling the suit property.

6. The learned Trial Court has dismissed the suit vide judgment and decree dated 19.03.2014. The learned Trial Court has held that the plaintiff had failed to establish preferential right of purchase. It is held that the plaintiff had failed to make out any case for grant of any relief and the suit was dismissed accordingly.

7. Aggrieved by the dismissal of the suit, the plaintiff filed First Appeal under Section 96 of the Civil Procedure Code, which came to be registered as Regular Civil Appeal No.147 of

2014. Pending the hearing of appeal, the defendants sold the property to one Sangita Balasaheb Kharad. The said purchaser was added as a party respondent in the appeal. The learned First Appellate Court has dismissed the appeal after hearing the parties vide judgment and decree dated 21.07.2020. The learned First Appellate Court has held that the lands were not jointly allotted to Manikbhai/father of plaintiff and Yasin/husband of defendant no.1. It is held that plaintiff is not entitled for the relief of preemption or partition or the perpetual injunction. The learned First Appellate Court has confirmed the findings recorded by the learned Trial Court.

8. Being aggrieved by the dismissal of his appeal, the plaintiff has filed the present Second Appeal. Although, 14 grounds are incorporated in the memorandum of appeal, the plaintiff/appellant has led emphasis on two questions, which according to him are substantial questions of law. The first contention of the plaintiff is that, although, gut no.189 was allotted to Manikbhai, his father and Yasin/husband of defendant no.1, on different dates and separate numbers were given to the land allotted to both of them, in essence, there was no sub division of the gut number and for the said

purpose, the plaintiff relies upon evidence of PW-2, Shri Kedar, who was working as Scrutiny Clerk in the Office of Deputy Inspector of Land Records.

9. The evidence of PW-2, Scrutiny Clerk from the Office of Deputy Inspector Land Record does not advance the case of the plaintiff on the point that there was no sub division. The said witness does not dispute that the total land in gut no.189 was allotted to two individuals. The date of allotment is also not disputed. All that is said by this witness that there is no entry in the Office of Deputy Inspector of Land Record regarding allotment of particular portion in gut no.189 to a particular individual. The said evidence is rightly appreciated by both the learned Courts to hold that the said evidence cannot lead to inference that allotment of properties to father of plaintiff and husband of defendant no.1 was joint allotment.

10. The learned First Appellate Court has also dismissed the suit for want of cause of action in as much as the suit was filed prior to actual sale of the suit property. The said finding is challenged by the appellant contending that, in fact that the defendant sold the suit property while the appeal was pending

is sufficient to establish that the apprehension expressed by the plaintiff was genuine and the defendants indeed were intending to sell the suit property to defeat his right of preemption.

11. Heard Mr. Rahul Karpe, the learned Advocate for the appellant. Mr. Karpe has advanced submissions as above, predominantly contending that the parties are members of a family and the entire gut number is allotted to the two brothers as one unit, although formal dates of allotment may be different due to the fact that consideration was not deposited by the brothers at the same time. He contends that admittedly both the lands are a part of the same gut number and parties are members of a family. This according to him is sufficient to make out a right of preemption. He contends that the learned Courts have erred in holding that the plaintiff had failed to make out a right of preemption.

12. As regards the findings by the learned First Appellate Court that the suit was not maintainable on the ground that the property was not sold prior to filing of the suit, the learned Advocate has vehemently argued that the apprehension in the

amount of the plaintiff was proved to be correct by the act of the defendants in selling the suit property pending the final disposal of the appeal. He contends that the learned First Appellate Court has erred in holding that the suit was not maintainable on the ground that the property was not in fact alienated prior to filing of the suit.

13. The second contention raised by the learned Counsel for the appellant, criticizing the finding by the learned First Appellate Court that the suit was not maintainable on the ground that the property was not sold prior to the suit is liable to be rejected in view of judgment of the Hon'ble Supreme Court in the matter of *Kumar Gonsusab & Ors. Vs. Mohammed Miyan Urf Baban and Ors (2008) 10 SCC 153*. In the said case, the defendant had entered into an agreement of sale with respect to the immovable property. In view of the said agreement, the plaintiff filed suit for preemption. The suit was dismissed by the learned Trial Court, one of the grounds being that the suit was not maintainable since the property was not in fact sold. The First Appeal was also dismissed. However, the Second Appeal filed before the High Court was allowed. The defendants then challenged the

decree passed by the High Court before the Hon'ble Supreme Court. The Hon'ble Supreme Court allowed the appeal holding that the suit was not maintainable, in view of the fact, the suit for enforcement of right of preemption was not maintainable prior to sale of the property. The Hon'ble Supreme Court has placed reliance on commentary of Mulla on Muhammadan Law to hold that right to preemption accrues only on sale of immovable property. It is held that unless the property is sold, suit for enforcement of right of preemption cannot be filed.

14. In that view of the matter, the contention with respect to maintainability of the suit raised by the appellant is liable to be rejected. The learned First Appellate Court is right in holding that the suit filed by the appellant/original plaintiff was not maintainable since the property was not sold prior to filing of the suit.

15. As regards the second contention that the plaintiff and defendants are family members and the both portions of gut no.189 were jointly held by them, the question cannot be a pure question of law, rather, it is pure question of fact. Both

the learned Courts have held that the lands were allotted separately. It is clearly established on record that Yasin, the husband of defendant no.1 took the land in the year 1977 itself whereas Manikbhai, father of the plaintiff could not acquire the land during his lifetime as he did not pay the consideration and the consideration was paid by the plaintiff in the year 1983 after demise of Manikbhai. The fact that the plaintiff and defendants paid the nazrana/consideration separately is by itself sufficient to infer that the allotment of land was not joint allotment as is contended. Had that been so, nazrana/consideration for the entire land would have been required to be paid together and unless the entire amount was paid, no portion of land could have been allotted. It is the case of the plaintiff himself that the land was allotted to the Yasin in the year 1977 itself and plaintiff got the land in the year 1983.

16. Apart from this, the plaintiff tried to contend that the transfer of land by the defendants is hit by provisions of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act. The said contention is liable to be rejected in as much as the plaintiff has failed to prove that the suit

property sold by defendants was a fragment within the meaning of the said Act. There is no material on record to substantiate this plea.

17. The learned Counsel for the appellant has placed strong reliance on judgment of the Hon'ble Supreme Court in the matter of *Smt. Mattoo Devi Vs. Damodar Lal (2001) 3 S.C.R 1009*. Placing reliance on the said judgment, it is contended that although right of preemption can be enforced only after a sale, it exists prior to the actual sale. The right which is already in existence can be enforced only after the sale. The said judgment also does not help plaintiff/appellant. It needs to be mentioned that the said judgment pertains to right of preemption between co-owners, which is not a case in the present appeal. In the present appeal, the parties cannot said to be co-owners of their respective lands. The suit property in the said case was a residential house. In the said case, the plaintiff had entered into agreement of sale with the defendant and thereafter had expressed inability to purchase the suit house. The issue was whether the right of preemption was waived by refusing to purchase the property.

18. In that view of the matter, no substantial question of law arises for consideration in the present appeal. The appeal is therefore liable to be dismissed and is **dismissed** with no order as to costs.

19. Pending Civil Applications, if any, stand disposed of.

(ROHIT W. JOSHI, J.)