



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.91 OF 2025

Appellant(s):

(On R.A.)

1. Smt. Saroj Wd/o Ramchandra Dhumal,
Aged about 80 years,
Occupation – Household
2. Sunil S/o Ramchandra Dhumal,
Aged about 53 years, Occupation – Service.
3. Ku. Suhas D/o Ramchandra Dhumal,
Aged about 50 years, Occupation – Service.
4. Smt. Kanchan W/o Pramod Rukhmangad,
Aged about 56 years, Occupation – Housewife.
Appellants No.1 to 4 all R/o House No.904,
Sakkardara Road, Zenda Chowk, Mahal, Nagpur.
5. Sau. Shubhangi W/o Satish Khandekar,
Aged about 48 years, Occupation – Service,
R/o Kumudini, Near Papad Factory, Ambapeth,
Amravati.

– Versus –

Respondent(s):

(On R.A.)

1. Umesh S/o Laxmanrao Nagpure,
Aged about 36 years, Employed with Company,
R/o Shivaji Nagar, Mahal-32, Nagpur.
2. Pradeep S/o Gulabrao Kshirsagar,
Aged about 45 years, Occ : Pigmy Agent,
Parshuram Urban Co. Op. Credit Society,
Gurudeo Nagar,
R/o Tulsibag Road, Chitnispura, Nagpur.
3. Surendra S/o Gulabrao Kshirsagar,
Aged about 35 years, Occ : Service,
Muk Badhir Vidalaya, Shankar Nagar,
R/o Tulsibag Road, Chitnispura, Nagpur.
4. Smt. Prabha Wd/o Prabhakar Dhumal (Dead).

5. Vaishali D/o Prabhakar Dhumal,
Aged about 41 years, Occ : Housewife.
6. Kishor S/o Prabhakar Dhumal,
Aged about 43 years, Occ : Service with Office of
Commissioner of Provident Fund, Mumbai.
Defendant Nos.4 to 6 R/o B/32, Kamalposhpa Co.
Op. Housing Society, Bandra (W), Mumbai.
7. Padmakar S/o Nilkanthrao Dhumal (Dead)
8. Shripad S/o Nilkanth Dhumal,
Aged about 63 years, Occ : Retired,
R/o J-1 U.P Nagar, Nasik Road, Nashik.
9. Dilip S/o Nilkanth Dhumal (Dead)
10. Arvind S/o Nilkanth Dhumal,
Aged about 58 years, Occ : Service,
R/o Ujjawal Nagar, Somalwada, Nagpur.
11. Vasant S/o Nilkanth Dhumal,
Aged about 56 years, Occ : Private reported to be
looking after "Vruddhashram"
belonging to Mr. Pathak,
R/o 196, NELCO Society, Sibhash Nagar, Nagpur.
12. Smt. Mandakini W/o Ashok Pimple,
through L.Rs.
 - 12(a) Parag S/o Ashok Pimple,
Aged about 47 years, Occ : Service.
 - 12(b) Sachin S/o Ashok Pimple,
Aged about 44 years, Occ : Service.
 - 12(c) Anjali D/o Ashok Pimple,
Aged about 46 years, Occ : Household.
 - 12(d) Nirranjan S/o Ashok Pimple,
Aged about 41 years, Occ : Service.
 - 12(e) Ashok Pimple,
Aged about 81 years, Occ : Retired.

All 12(a) to 12(e) are R/o Behind Sudama Cinema Hall, Dharampeth, Nagpur.

13. Sanjay S/o Ramchandra Dhumal,
Aged about 54 years, Occu. Retired,
R/o Vijayshri Apartment, Near Ram Vatika, Rajiv
Nagar Bus Stand, Rajiv Nagar, Hingna Road,
Nagpur.

Mr. R.L. Khapre, Senior Advocate a/b Mr. D.R. Khapre and
Mr. R.G. Kavimandan, Advocates for the Appellants.
Mr. M.A. Sable, Advocate for Respondent Nos.1 to 3.

CORAM : **ROHIT W. JOSHI, J.**
DATE : **16th OCTOBER, 2025.**

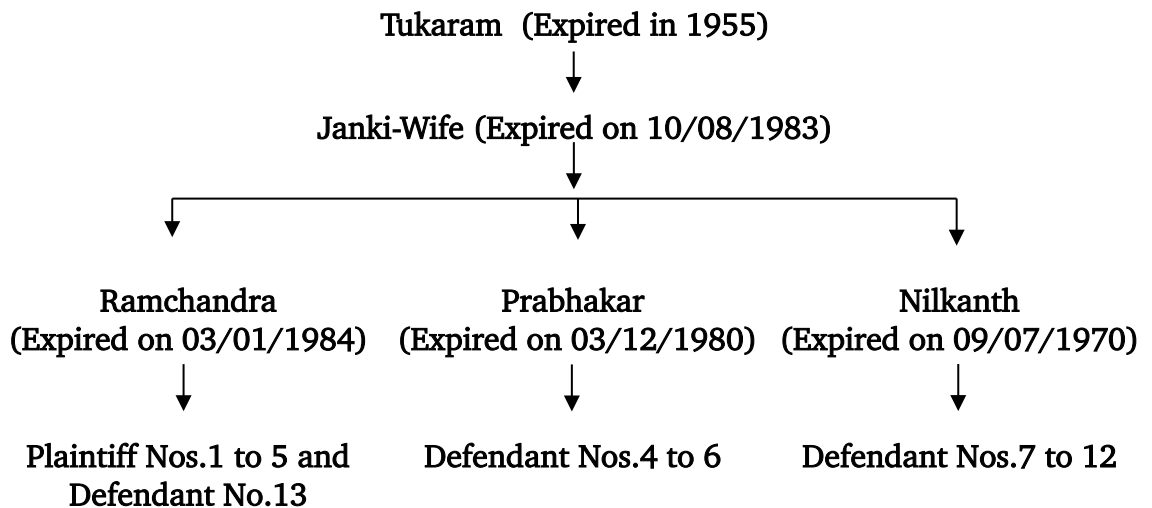
ORAL JUDGMENT :

Heard the learned Advocates for the parties.

02. The appellants are the original plaintiffs, who had filed a suit for preemption against the respondents. The suit came to be dismissed by the learned trial Court and appeal preferred therefrom met with the same fate. The parties will be referred hereinafter as plaintiffs and defendants.

03. The plaintiffs and defendant Nos.4 to 15 are descendants of late Tukaram Gangaram Dhumal, who left for his heavenly abode sometime in the year 1955. He was survived by his wife-Janki, who expired on 10/08/1983 and three sons Ramchandra, Prabhakar and Nilkanth, who expired on 03/01/1984, 03/12/1986 and 09/07/1970 respectively. Plaintiff No.1 is widow and plaintiff No.2 and defendant No.13 are sons of Ramchandra and

Plaintiff Nos.3 to 5 are his daughters. Defendant Nos.4 to 6 are widow, daughter and son of Late Prabhakar respectively and defendant Nos.7 to 12 are sons of deceased-Nilkanth. Defendant Nos.1 to 3 have purchased the suit property from defendant Nos.4 to 12 vide sale-deeds dated 20/12/2010. Defendant No.13, who is son of Ramchandra, has accorded his consent for the said transaction. The following family tree will explain the genealogy of the family of plaintiffs and defendant Nos.4 to 13.



04. Deceased-Tukaram was owner of the suit property, which comprises of a house which was initially numbered as NMC House No.904, City Survey No.239, situated at Sakkardara Road, Zenda Chowk, Nagpur. The said house property, which was initially numbered as 904, is now bearing three separate numbers viz. 904, 904-A and 904-B. The total area of the suit property was 207.37 sq.mtrs., out of which, some portion of land was acquired and the area of the suit property was accordingly reduced to

187.895 sq.mtrs. Deceased-Tukaram had executed a will dated 26/12/1954 bequeathing the suit property to his three sons. The northern side portion admeasuring around 77.771 sq.mtrs. was bequeathed in favour of Ramchandra (predecessor of plaintiffs and defendant No.13), middle portion admeasuring around 53.393 sq.mtrs. was bequeathed in favour of Prabhakar (predecessor of defendant Nos.1 to 6) and admeasuring around 55.75 sq.mtrs. on the southern side in favour of Nilkanth (predecessor of defendant Nos.7 to 12.).

05. It is the case of the plaintiffs, in the month of November, 2010, they got knowledge that defendant Nos.4 to 6 had entered into an agreement of sale with respect to the middle portion in the suit property with defendant No.1 *inter alia* agreeing to purchase the same for consideration of Rs.12,94,000/- and that defendant Nos.2 and 3 had entered into an agreement to purchase southern portion of the suit property from defendant Nos.7 to 12 for consideration of Rs.13,50,000/-. The plaintiffs contend that they had issued notice dated 13/12/2010 calling upon defendant Nos.4 to 12 to revoke the aforesaid agreements of sale, however, the said defendants informed the plaintiffs on 19/12/2010 that they had finalized the transactions with defendant Nos.1 to 3 and that the defendant No.13 had also accorded consent for the said transaction. It is further stated that on the next day, i.e. 20/12/2010, defendant Nos.4 to 12 executed two separate sale-deeds with

respect to the suit property in favour of defendant No.1 and defendant Nos.2 and 3. The plaintiffs had filed the suit in order to enforce their alleged right of preemption. It will be pertinent to mention here that it is the case of the plaintiffs that plaintiff No.4 is in occupation of middle portion of the suit property with consent of defendant Nos.4 to 6. The prayers in the plaint are as under :

- i) *To declare that plaintiffs have right of preemption in suit House No.904;*
- ii) *To declare sale-deeds registered at Sr. No.5537 and 5540 on 20/12/2010 in favour of defendants No.1 to 3 as null and void and not binding on plaintiffs to execute sale-deed to plaintiffs by defendant Nos.4 to 12 of suit house;*
- iii) *To grant permanent injunction against all defendants from removing, demolishing and damaging the existing structure of suit house in any manner;*
- iv) *To grant permanent injunction restraining the defendants from disturbing occupation and possession of plaintiff No.4 of a middle portion of suit house.*

06. It will also be appropriate to refer to the relevant averments in the plaint to understand the case of the plaintiffs. In paragraph 1 of the plaint, the plaintiffs have averred that late Tukaram had divided the suit

house in three parts between his three sons under the will executed by him in their favour. The northern portion is stated to be in possession of the plaintiffs, middle portion is stated to be in possession of defendant Nos.4 to 6 who are descendants of Prabhakar and the southern portion is stated to be in possession of defendant Nos.7 to 12, who are the descendants of Nilkanth. It is specifically stated in paragraph 2 that plaintiff No.4 is in permissive occupation and possession of the middle portion belonging to Prabhakar. It is averred that the suit house is an ancestral dwelling house of plaintiffs and defendant Nos.4 to 13. It is also stated that defendant Nos.4 to 13 were not residing in the suit house at the time of filing of the suit.

07. The defendants filed their written statement denying the right of preemption. The defendants also stated that defendant No.1 had issued public notice disclosing intention to purchase the suit property. It is also stated that since the property were partitioned, the plaintiffs had no right of preemption as claimed. In view of said findings, the learned trial Court has dismissed the suit.

08. Perusal of the judgment passed by the learned Trial Court will demonstrate that it has recorded a finding that although the property was not shown to be separated in the records of City Survey Department, the parties had separated and were in respective possession of their properties as per the will. The learned Trial Court found that all the parties were asserting right to

their respective shares in the suit house on the basis of will executed by deceased-Tukaram and that the said will was an admitted and undisputed document. It is found that the suit property was divided into three parts by the will and it was allotted separately to three sons of the testator by dividing the same in three separate parts. The learned Trial Court has elaborately dealt with the contents of the will and held that the property was partitioned between three sons by virtue of the said will. The learned Trial Court found that since the property was bequeathed, the inheritance was not intestate and, therefore, Section 22 could not be invoked. It is held that the plaintiffs had also failed to prove jointness. The learned Trial Court referred to the provisions of Section 22 of the Hindu Succession Act, 1956 and held that the plaintiffs had failed to make out right of preemption under the said provision.

09. A contention was also raised before the learned Trial Court with respect to Section 44 of the Transfer of Property Act, 1882 (*hereinafter referred to as 'TP Act' for short*). The said contention was rejected relying upon the evidence, which suggested that the portions in the house were divided and, therefore, the suit property was not being used as a common dwelling house by members of the undivided family.

10. Aggrieved by dismissal of their suit, the plaintiffs filed first appeal being R.C.A. No.653/2017. In the said appeal, a contention was raised that under the will dated 26/12/1954, Tukaram had created life interest with

respect to the suit property in favour of his wife-Janki. It is stated that the limited estate ripened into a full estate upon the commencement of the Hindu Succession Act and that Janki was absolute owner of the suit property during her life time and further that the suit property was inherited by the predecessors of the plaintiffs and defendant Nos.4 to 13, who are sons of Janki, after her demise. This contention is probably raised in order to overcome the difficulty under Section 22 of the Hindu Succession Act, which provides for right of preemption only in the case of intestate succession and not in the case of testamentary succession. The learned First Appellate Court had also dismissed the appeal holding that the plaintiffs had failed to establish right of preemption. It is also held that the plaintiffs failed to prove that the suit house was an ancestral property jointly held by all the family members. The learned First Appellate Court also held that mother-Janki could not be said to be an absolute owner of the suit property by virtue of life interest created in her favour by will. It is held that the case would be covered by Section 14(2) and not Section 14(1) of the Hindu Succession Act. The learned First Appellate Court also found that the property was divided amongst members of three branches and, therefore, the plaintiffs had failed to establish right of preemption. The appeal was accordingly dismissed.

11. It will also be pertinent to state that the learned Trial Court had recorded a finding against defendant Nos.1 to 3 that they were not *bona fide*

purchasers. Defendant Nos.1 to 3 had preferred cross-objection challenging the said findings. The learned First Appellate Court held that defendant Nos.1 to 3 had proved that they were *bona fide* purchasers of the suit property.

12. Section 22 of the Hindu Succession Act provides right of preemption in favour of heirs of a deceased Hindu *inter se* amongst the Class-I legal heirs, in case where the owner dies intestate. Perusal of the provision will indicate that right of preemption is not available in case of a testamentary succession. Moreover, the right is conferred *inter se* between legal heirs specified in Class-I of the Schedule. The property belonged to Tukaram, his Class-I legal heirs were his widow-Janki and three sons, who are predecessors of the plaintiffs and defendant Nos.4 to 13. The right of preemption is restricted only to Class-I legal heirs of the deceased-owner and not to the descendants of Class-I legal heirs of the owner. In the case at hand, it is apparent that the plaintiffs and defendant Nos.4 to 13 are descendants of Class-I legal heirs of deceased-Tukaram. They are not Class-I legal heirs of Tukaram. In view of the above, it is apparent that the plaintiffs cannot claim right of preemption against defendant Nos.4 to 12.

13. There is another reason for which right of preemption will not be available i.e. the property has devolved by testamentary succession and not by intestate succession.

14. Assuming that Janki, mother of the predecessors of the plaintiffs and defendant Nos. 4 to 12, became absolute owner and the property was vested with her three sons, who are predecessors of plaintiffs and defendant Nos.4 to 12 by intestate succession after her demise, yet right of preemption will not be available to the plaintiffs and defendant Nos.4 to 12. This right could be claimed by three sons of deceased-Janki, who are predecessors of the plaintiffs and defendant Nos.4 to 13 *inter se* amongst themselves. However, after the demise of three sons, right of preemption will not be available to the descendants of any one son against the descendants of other two sons. The plaintiffs in the present case are descendants of one of the sons, namely, Ramchandra. They are claiming right of preemption against the descendants of two other sons viz. Prabhakar and Nilkanth. The right of preemption, if any, cannot be claimed by the plaintiffs against defendant Nos.4 to 13.

15. Perusal of Section 22 of the Hindu Succession Act makes it clear that right of preemption is restricted *inter se* between legal heirs specified in Class-I and it does not vest with the descendants of such Class-I legal heirs. In view of the above, both the learned Courts have rightly rejected the prayer relating to right of preemption.

16. Mr. R.L. Khapre, learned Senior Advocate appearing for the appellants strenuously urged that the sale-deeds are void in view of Section 44 of the TP Act. He contended that admittedly the suit property is a

residential house of the plaintiffs and defendant Nos.4 to 13. He further contended that the house was not actually partitioned by virtue of the will and that the will only made an arrangement for residence of families of three sons of the testator and as such the suit property continued to be a shared dwelling house of members of the undivided family. Mr. Khapre contended that the property was not sub-divided in the City Survey Record, which is sufficient to establish that the property was not partitioned. As regards, different house numbers being allotted to the suit house, his contention is that the said arrangement is done only for payment of corporation taxes separately by branch of each brother and, therefore, although three different house numbers were allotted to the suit property, the same remained to be undivided.

17. *Per contra*, Mr. M.A. Sable, learned Advocate for the respondents contended that Section 44 of the TP Act cannot be invoked by the appellants-plaintiffs since the suit was filed only for enforcement of alleged right of preemption. He further contended that even otherwise the house property was divided between the families of three brothers and as such it was not a shared household. Mr. Sable, therefore, contended that the appeal is liable to be dismissed.

18. It is not in dispute that the father had executed will bequeathing the suit property to his three sons. Perusal of will demonstrates that separate

demarcated portions are bequeathed in favour of each son. A specific averment is made in first paragraph of the plaint that late Tukaram had divided the suit house in three parts by virtue of the will. The plaintiffs have further stated in paragraph 2 of the will that family of each son was in occupation and possession of the specific portion, which was bequeathed in his favour under the said will. With these averments, it is also stated that the property was mutated jointly in the names of all family members in the record of City Survey Department and Nagpur Municipal Corporation and, therefore, the property was joint property of the family members.

19. As regards the contention with respect to Section 44 of the TP Act, at the outset, it must be stated that Section 44 does not prohibit any co-owner of a house property belonging to undivided family to sell his share therein to a person, who is not a member of the family. Perusal of provision will demonstrate that a transferee of share of a dwelling house belonging to an undivided family is not entitled to joint possession of the family house with other family members. Thus, the prohibition under Section 44 of the TP Act is not against sale of joint residential unit of a family to a person, who is not member of the family. Therefore, alienation of a joint dwelling house by one of the co-owners to a person who is not a family member is not illegal. The only restriction will be that the purchaser, who is not a family member, would not be entitled to joint possession of the family dwelling house with other

family members. Thus, assuming though not admitting that the house property was not partitioned, the sale-deeds executed by defendant Nos.4 to 12 in favour of defendant Nos.1 to 3 cannot be set aside in view of Section 44 of the TP Act.

20. As regards jointness, it is not in dispute that the property has devolved on three sons by virtue of will executed by their father. The will demarcates the portion allotted to each son. There is a specific averment in the plaint that the father had divided the property between three brothers by virtue of the will. It is further stated that family of each brother was in occupation of the specific portion allotted to him by virtue of the will. Thus, separate identifiable portions in the suit house were bequeathed by the father in favour of each son. There is clear demarcation of share of each son in the will. It is, therefore, clear that the brothers got three separately demarcated shares in the suit property by virtue of the will. The will vested each brother with a separate share in the suit property and each brother received separate possession thereof. The plaintiffs and defendant Nos.4 to 13 are descendants of the said three brothers. The suit house, therefore, cannot be said to be a joint family dwelling house of the three sons. The contention is fortified by the plaint averments. The only contention in the plaint with respect to the suit property being joint residential house is that the same was jointly mutated in the records of City Survey Department and Nagpur Municipal

Corporation. It is well settled that the mutation entries are merely for fiscal purposes and by themselves cannot determine the nature of property held by a co-owner. The contention that the property is joint, is sufficiently negated by the contents of the will and other averments in the plaint. It will also be pertinent to mention here that there is other evidence on record to sufficiently establish that the property was indeed partitioned. The learned Courts have properly appreciated the documentary evidence in this regard and have recorded a finding of fact that the house property was not a single dwelling unit of one family but comprised of three separate dwelling units of families of three brothers. The suit house which was earlier bearing house No.904 was allotted three separate numbers viz. 904, 904-A and 904-B. The evidence of Architect also shows that he had prepared the plan as per possession of each branch in the family, which also shows separate possession of three branches of families of three brothers. In view of the aforesaid, in the considered opinion of this Court, even Section 44 of the TP Act does not come to the aid of the plaintiffs for the reason that the house property was not joint dwelling house of families of all three brothers and also on the ground that Section 44 of the TP Act does not prohibit sale of property by a co-owner. The prayer in the suit is restricted to challenge to the sale-deed. The prayer is not for restraining the purchasers/defendant Nos.1 to 3 from enjoying joint possession of the house with other family members.

21. In view of the aforesaid, no substantial question of law arises for consideration in the present second appeal. The second appeal is, therefore, dismissed with no order as to costs.

Civil Application [CAS] No.996 of 2025 :

22. The appellants have filed an application under Order 41 Rule 27 of the Code of Civil Procedure seeking permission to lead additional evidence.

23. The documents, with respect to which additional evidence is sought to be led, are pertaining to record of City Survey Department and certain orders passed by Officers of the said department relating to mutation of the property.

24. The plaintiffs have led evidence to demonstrate that in the record of City Survey Department, the entire property is mutated as one single property. On this basis, contention was raised that there is no partition as alleged by the defendants. The documents, with respect to which additional evidence is sought to be led, are also for the same purpose. This court has found that the will clearly demarcates separate portions bequeathed in favour of three sons and the plaint clearly recites that the suit house was divided between three sons of the testator by the will. The documents even if they are read in evidence, by no means will be sufficient to dislodge material admission in the pleading as also a fact that emerges from the reading of will itself that the suit property is divided amongst three brothers, who resided in

their respective portions allotted to them under the will.

25. In the considered opinion of this Court, the application is liable to be rejected and is hereby rejected since, even if the documents are accepted in evidence, the outcome of the appeal will not change.

(Rohit W. Joshi, J.)

**sandesh*