



Judgment

377 cra104.22

1

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

CIVIL REVISION APPLICATION NO.104 OF 2022

1. Narayandas Leelaram Jadhvani,
aged about 55 years, occupation:
businessman, resident of Akot,
district Akola.

2. Harish Gopaldas Jeswani, aged
about 55 years, occupation:
businessman, resident of Akola
road, near house of Suresh
Agrawal, Akot, district Akola. **Applicants.**

:: VERSUS ::

1. Ashok Mohanlal Tawari, aged
about 55 years, occupation:
agriculturist, resident of Jawahar
road, main road, Akot, district
Akola.

2. Sou.Usha w/o Ashok Kumar
Tawari, aged about 50 years,
occupation: housewife and
carrying on business: housewife,
resident of Jawahar road, Akot,
district Akola.

3. State of Maharashtra, represented
by Collector Akola.

4. State of Maharashtra, represented

2

by taluka Inspector of Land Records, Akot Office premises of tahsil office Akot, district Akola.

5. Abdul Ahad Abdul Hamid, aged about 50 years, occupation: businessman, resident of behind Urdu School Akot, district Akola for himself and holding special power of attorney for other legal heirs of deceased Abdul Hamid Abdul Majid as well as legal heirs of deceased Abdul Hamid Abdul Rahman, who was ancestor owner of the property.

6. Suresh Govardhandas Kotak, aged about 60 years, occupation: businessman, resident of Jawahar Nagar, Akot, district Akola.

7. Kishore Maniklal Dawar, aged about 70 years, occupation: businessman for himself and holding special power of attorney for legal heirs of deceased Maneklal Govardhandas and others, r/o Keshavraaj Defal, Jingerwadi, Akot, district Akola. **Non-applicants.**

Shri Atharva Manohar, Counsel for Applicants.
Shri A.B.Mirza, Counsel for NA Nos.1 & 2.
Mrs.S.V.Kolhe, AGP for NA Nos.3 & 4.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 10/02/2025

PRONOUNCED ON : 26/03/2025

JUDGMENT

1. Heard learned counsel Shri Atharva Manohar for applicants, learned counsel Shri A.B.Mirza for non-applicant Nos.1 and 2, and learned Assistant Government Pleader Mrs.S.V.Kolhe for non-applicant Nos.3 and 4.

2. The order passed by learned CJSD, Akot below Exh.23 rejecting the application under Order VII Rule 11 of the CPC in Special Civil Suit No.3/2022 dated 9.6.2022 is under challenge.

3. The applicants herein are original defendant Nos.3 and 4. The said suit has been filed by the original plaintiffs seeking enforcement of their rights of pre-emption in respect of suit properties which are being sold in execution of the decree in RCS No.129/1964. Landed

4

property of shop No.5 bearing plot No.7/4 nazul sheet No.19-D admeasuring 104.3 square meters having two storied building consists of shops on ground floor and residence of the first floor is the subject matter of the suit. As per the plaintiffs, suit property has been purchased from the original owner of the said property as per the registered sale deed dated 27.2.2024 for valuable consideration for landed property as well as suit structure. The plaintiffs have developed the said property. This property has been purchased by plaintiff No.1 Ashok Kumar from legal heirs of original owner Abdul Majeed Abdul Rehman. Prior to purchasing of the shop by registered sale deed, the father of the plaintiff No.1 has purchased and got assignment of the shop from the previous tenant as well as from the land lord and he was in possession of the said shop as a lawful tenant thereof and subsequently he has purchased the said shop for

5

valuable consideration. Similarly, the suit property mentioned in item No.2 shop no.6 out of plot No.7/4 nazul sheet No.19-D admeasuring 87 meters was belonging to the Kotak family i.e. defendant No.6 comprising of 3 parts and occupied by 3 tenants. Plaintiff No.2 being lawful tenant was in possession of the said shop No.6 and lease deed has been executed in his favour by defendant No.6. Plaintiff No.2 has paid lease money as well as regular rent. Thus, both the suit properties which are part and parcel of the joint property including adjoining shops was the subject matter of the partition of suits. The said partition suit bearing RCS No.129/1964 was decided on 24.4.1964 and the decree passed in the said suit is confirmed in the appeal by order dated 13.4.1976.

4. Plaintiff No.1 being co-owner of the property had purchased shop No.5 from erstwhile owner Abdul Majeed.

6

Plaintiff No.2 was in possession as a legally protected tenant and purchased the suit shop and structure thereof assignment of the lease by paying the advanced rent amount. The lease hold legal rights has been protected as per The Maharashtra Rent Control Act. Being the owner of the suit shop, he had pre-emption right over the suit shop. Plaintiff Nos.1 and 2 have demanded their rights to purchase the property preferentially by way of pre-emption which is substantial right. But, without considering their valuable right, the property has been sold in public auction in the *mesne profits* and, therefore, the plaintiffs approached the court for declaration, permanent injunction and decree of pre-emption.

5. The present applicants who are original defendant Nos.3 and 4 after appearance filed an application under Order VII Rule 11 of the CPC for rejection of the plaint on the ground that all questions as to the said property shall

7

be determined by the executing court in exercise of Section 47 of the CPC and, therefore, the suit is not maintainable. The suit is barred by law of *res judicata*. It is further contended by them that the suit property is disposed of by way of decree of the court and, therefore, after sale of the suit property, the said right of pre-emption is not available to the plaintiffs and thus no cause of action arose to claim the right of pre-emption and, therefore, the plaint deserves to be rejected.

6. Learned counsel for the applicants submitted that the original plaintiffs have filed Special Civil Suit No.3/2022 for pre-emption and declaration and injunction. The prop No.1 bearing shop No.5 (1/3 share) has been purchased by the plaintiff No.1 on 27.2.2004. As per the contention of the plaintiffs, property No.2 shop No.6 in possession of the plaintiff No. 2 as tenant since 2004. The right of pre-emption arises only in context of

8

voluntary sale of property not in case of invulnerable transaction. It is settled law that right of pre-emption does not arise in respect of property sold in execution of the decree when such right is claimed under personal law or custom or statute. A judicial sale however takes place against the will of the owner and is therefore not the outcome of his volition. There is no privity of contract between judgment-debtor and execution-purchaser. Unless right of pre-emption is expressly conferred by statute, the right cannot arise in respect of involuntary sales. He further submitted that Order XXI Rule 88 of the CPC is applicable where the property is sold is a share of undivided immovable property and two or more persons of whom one is co-sharer of the said property bid for the sale and his bid is equal to the bid of the highest amongst the others. Right of pre-emption has been recognized in a restricted form in view of Order XXI Rule 88 of the CPC

9

and does not confer blanket right of pre-emption. He submitted that in fact right of pre-emption is an inherently weak right. The same can accrue only through statute enactment, custom or personal law. There is no statutory basis for the claim of the pre-emption raised in the suit. Custom if any under which right of pre-emption is to be claimed is required to be specifically pleaded. The plaintiffs have not pleaded any custom which confers right of pre-emption. The personal law of the plaintiffs does not give rise to any right of pre-emption. In the absence of any pleading or source of right no cause of action is disclosed from the suit and the plaint deserves to be rejected. He further submitted Section 4 of the Partition Act will have application only in case where share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and where such transferee not

10

being a member of the undivided family sues for partition and where such transferee not being member thereof suit for partition even in such a case the right shall accrue only in favour of the member of family who is sharer of such transferee. None of essential conditions requisite for invoking Section 4 of the Partition Act is present in the case. For all above these reasons, he prays for rejection of the plaint.

7. In support of his contentions, learned counsel for the applicants placed reliance on following decisions:

1. **Shivraj Krishan Gupta vs. Chander Krishan Gupta and ors**, reported in 2013 (135) DRJ 96 High Court of Delhi;
2. **Ghantesher Ghosh vs. Madan Mohan Ghosh and ors**, reported in (1996)11 SCC 446;
3. **Sunita Jugalkishore Gilda vs. Ramanlal Udhoji Tanna (dead) thr.LRs and ors**, reported in (2013)10 SCC 258;

11

4. Dahiben vs. Arvinbhai Kalyanji Bhanusali (gajra) dead thr.LRs and ors, reported in (202)7 SCC 366;

5. Raia Dudraraji Sinai Salelicar alias Rudraji Salelkar vs. Laxmibai Kasturchand, reported in 2023(6) ABR 103;

6. T.Arivandandam vs. T.V.Satyapal and anr, reported in (1977)4 SCC 467;

7. Udyavara R.Acharya and anr vs. Jugal Kishor Jgannath Sharda, reported in 2020(5) Mh.L.J. 227;

8. Prabodh K.Mehta vs. Charuben K.Mehta, reported in 2014 SCC OnLine Bom 1651;

9. Hamedmiya Badamiya Saheb vs. Dr.Joseph Benjamin, reported in (1877)3 APP Cas.213, and

10. Ramnath vs. Narayan, reported in AIR 1932 Nagpur 44.

8. *Per contra*, learned counsel for non-applicant Nos.1 and 2 submitted that the plaintiffs have specifically pleaded their statutory right to pre-emption under the Partition Act particularly under Sections 4 and 6 of the Act arising in the context of dwelling house of HUF. The

12

statutory scheme grants co-owners like the plaintiffs the right to purchase property that is subject to partition and ensuring that the co-owners have the first opportunity to acquire the property before it is sold to a third party. The Hon'ble Apex Court has repeatedly emphasized that while adjudicating an application under Order VII Rule 11 of the CPC, the court must consider only averments in the plaint as true in their entirety and cannot dwell into the merits or defence of the case raised by the defendant. In view of the statutory right, the plaintiffs have claimed the right of pre-emption and, therefore, the application is rightly rejected by the learned trial court.

9. On hearing both the sides, the controversial question arises for determination is, whether there is any cause of action to file the suit in view of right of pre-emption.

13

10. As far as factual aspect is concerned, there is no dispute as to the fact that the plaintiff No.1 has purchased property No.1 bearing shop No.5 to the extent of 1/3rd share on 27.2.2004. The property No.2 bearing shop No.6 was in possession of the plaintiff No.2 as a tenant since 2004. As per the facts of the case, suit bearing RCS No.129/1964 was filed in respect of the suit properties for partition by the defendant No.6 in execution of the decree of the said suit. The application for *mesne* profit RCS No.129/1964 was registered and in execution of the order passed in the said application, the property was sold in auction by the order of the court.

11. The first objection raised by the applicants is that the suit is not maintainable and referred Section 47 of the CPC which deals with questions about the execution of decree. The said Section reads as under:

14

Section 47. Questions to be determined by the Court executing decree. - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[*Explanation 1.*-- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-- (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

15

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

12. Thus, in view of Section 47 of the CPC, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

13. Admittedly, the question has to be determined by the court in execution proceeding and not by separate suit.

14. Order XXI Rule 97 of the CPC also speaks about resistance or obstruction to possession of immovable property by which where the holder of a decree for the

16

possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction and where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

15. A third party to the decree who offers resistance or obstruction to execution of the decree would fall within the ambit of Rule 101 of Order XXI. Rules 97 to 101 of Order 21 contain the provisions enabling the executing court to deal with a situation when a decree holder entitled to possession of the property encounters obstruction from “any person”. From these Rules, the scheme is clear that wide powers are vested in the

17

executing court to deal with “all issues” relating to such matters.

16. The Hon’ble Apex Court in the case of **N.S.S. Narayana Sarma and ors vs. M/s.Goldstone Exports (P) Ltd. and ors, reported in AIR 2022 SC 251** held that when any person claiming title to the property in his possession obstructs the attempt by the decree-holder to dispossess him from the said property the executing court is competent to consider all questions raised by the persons offering obstruction against execution of the decree and pass appropriate order which under the provisions of Order XXI Rule 103 is to be treated as a decree.

It is further held by the Hon’ble Apex Court that Rules 97 to 101 of Order 21 contain the provisions enabling the executing court to deal with a situation when a decree holder entitled to possession of the property

18

encounters obstruction from “any person”. It is further held that the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

17. The similar view is taken by the Hon’ble Apex Court in the case of **Silverline Forum Pvt.Ltd. vs. Rajiv Trust and anr, reported in (1998)3 SCC 723** wherein it is held that “any person” in Rule 97(1) – a third party to the

19

decree including transferee *pendente lite* can offer resistance or obstruction - A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt, if the resistance was made by a transferee *pendente lite* of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. When a decree-holder complains of resistance to the execution of a decree, it is incumbent on the execution court to adjudicate upon it. In other words, "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such

20

questions as would legally arise for determination between those parties. Thus, it is held that the executing court can decide whether resister or obstructor is bound the decree.

18. Thus, it is apparent that in view of Section 47 of the CPC, separate suit is barred.

19. The another question is, whether right of pre-emption is available to the plaintiffs.

20. The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. This position is summarized by the Hon'ble Apex Court in the case of in **Bishan Singh vs. Khazan Singh**, reported in **AIR 1958 SC 838** and observed that, "(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called

21

the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e. the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.”

21. The Hon’ble Apex Court in the case of **Punyadeo Sharma and ors vs. Kamla Devi and ors**, reported in **2022(1) CCC (SC) 113** by referring the various earlier

22

decisions laid down legal principles that emerge in respect of the right of pre-emption are as under:

“1. The pre-emptor must have the right to preempt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance only.

2. The pre-emptor who claims the right to preempt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.

3. A pre-emptor who has a right to preempt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first

23

court would not affect his right or maintainability of the suit for pre-emption.

4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for pre-emption by the court of first instance, such right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation.”

22. The plaintiffs in the present suit claimed the right of pre-emption in view of Section 4 of the Partition Act. The said Section reads thus:

4. Partition suit by transferee of share in dwelling-house-

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and

24

such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

23. A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:

25

“(1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;

(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house

26

belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.”

24. An analysis of Section 4 of the Partition Act makes it clear that makes it clear that there is no express provision indicating the stage at which such application can be moved against the stranger transferee of the share

27

of an erstwhile co-owner of dwelling house of undivided family.

25. Thus, a pre-emptor has two rights: (i) inherent or primary right to the offer of a thing about to be sold and (2) a secondary or remedial right to follow the thing sold. The secondary right is simply a right of substitution in place of the original vendee. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee and that this superior right must subsist at the time the pre-emptor exercises his right.

26. The observations in the case of **Ghanshyam vs. Chand Bihari**, reported in **MANU/RH/1295 2008** deal with deals with the scenario where at the first instance the right was not exercised apparently on account of lack of financial means and that was held to be no ground to

28

permit exercise of that right at the second stage. The consistent view taken by the Rajasthan High Court has been that the right of substitution is capable of being invoked only at the first instance and does not continue to substitution is capable of being invoked only at the first instance and does not continue to pre-empt for an indefinite period of time for each sale transaction. It is held that the plaintiffs claiming pre-emption had waived their rights.

27. It is submitted by learned counsel for the applicants that in fact right of pre-emption is an inherently weak right. The plaintiffs have not pleaded any statutory basis for the claim of pre-emption raised in the suit. It is not pleaded under which right pre-emption is claimed and which is required to be specifically pleaded. In support of his contentions, he placed reliance on the decision in the case of **Hamedmiya Badamiya**

29

Saheb vs. Dr. Joseph Benjamin *supra* wherein it is held that the right of pre-emption is not an incident of property and is nothing more than a right of repurchase from the purchaser; such a right comes into existence after a valid, complete and *bona fide* sale, that is, after the title has passed to the purchaser and cannot be exercised in the case of any other alienation. It is further held that the right of pre-emption is nothing more than merely the right of re-purchase not from the vendor but from the vendee who is treated for all intents and purposes as the full owner of the property which is the subject-matter of that right, and holds that it is not a right of repurchase either from the vendor or from the vendee involving any new contract of sale but is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject to stand in the

30

shoes of the vendee in respect of all rights and obligations arising from the sale.

28. A mere look at Section 4 of the Partition Act shows that conditions to be satisfied are; (1) a co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein; (2) the transferee of such undivided interest of the co-owner should be an outsider or stranger to the family; and (3) such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. The said Section will have application only in case where share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and where such transferee not being a member of the undivided family sues for partition. The right shall accrue only in

31

favour of member of the family. None of essential conditions requisite are pleaded by the plaintiffs.

29. This aspect is also considered by the Hon'ble Apex Court in the case of **Ghantesher Ghosh vs. Madan Mohan Ghosh and ors** wherein it is held that in order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share-of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act.

30. The plaintiffs have admittedly acquired the property during the pendency of RCS No.129/1964 and and the interactions are clearly hit by provisions of Section 52 of the T.P. Act. The plaintiffs being transferee

32

pendente lite are bound by the decree in RCS No.129/1964. The same has been conclusively determined by this court in Writ Petition No.3316/2015 decided on 12.1.2018 wherein it is held that the petitioner filed an objection contending that his father Mohanlal Taori was tenant of the premises in question, since prior to the institution of Regular Civil Suit No.129 of 1964 and neither his father nor the petitioner (objector) were impleaded as party and therefore, the judgment and decree passed against them is binding them. It is not disputed that the Court Commissioner was appointed to effect partition as in RCS No.129/1964. It is not disputed that the Court Commissioner was appointed to effect partition as per the decree passed in Regular Civil Suit No. 129 of 1964. The Court Commissioner has submitted report that the property cannot be partitioned and to give effect to the decree, property will have to be

33

sold, so that the respective shares of the parties can be made available to them in cash. This court further considered the fact that as the petitioner that is plaintiff who was tenant, the learned trial Judge has rightly observed that there is no provision which requires that the tenant of the property in question is necessary or proper party in the civil suit praying for decree for partition. This court further considered that the objection raised by the plaintiff is rightly rejected by the executing Court recording that petitioner has purchased the property in question during pendency of the civil suit and therefore, the sale is hit by the doctrine of *lis pendens*. The contention of the petitioner that he is *bona fide* purchaser without notice of pendency of the civil suit cannot be accepted. It is also observed that the petitioner is always at liberty to take appropriate proceedings against the vendor for selling the property during the

34

pendency of civil suit without informing the petitioner about the pendency of the civil suit and dismissed the writ petition.

31. As far as the right of pre-emption claimed by the plaintiffs, in view of Section 4 of the Partition Act, is concerned, there is no pleading by which custom or the law the right of pre-emption is accrued. The fact is undisputed that the suit property is sold in execution of decree by the order of the court.

32. This court in the case of **Ramnath vs. Narayan, reported in AIR 1932 (Nagpur) 44** observed that a right of pre-emption, unless explicitly granted by statute, does not exist in cases of property sales ordered by a court in execution of a decree. It has been held that if the sale was a Court sale, are the defendants entitled as co-occupants to claim pre-emption in respect of the property

35

sold? The right of pre-emption arises either by virtue of personal law or custom or statute. It has been consistently held that the right of pre-emption does not arise in respect of property sold in execution of a decree when such right is claimed under the personal law or custom. Such sales are not the result of any private contract to which the person whose property is a party. They are the result of an authority conferred by the legislature upon the Courts for the purposes of awarding remedies against those who have failed to perform their pecuniary obligations.

33. Thus, the right of pre-emption is only a personal right and not an incident of property. The right springs up where there is a privity of contract between the owner, who sells, and the purchaser. The seller is incompetent to enter into contract of sale with any one unless the party having the option to purchase has had the opportunity to

36

exercise his option; if no such opportunity is given the purchaser is as much culpable of acting in derogation of the pre-emptor's right as the seller. A judicial sale however takes place against the will of the owner and is therefore not the outcome of his volition. There is no privity of contract between the judgment-debtor and the execution-purchaser. The sheriff authorized by the writ simply seizes the property of the execution debtor and passes his debtor's title to it without even warranting that title to be good.

34. Thus from the averments of the plaint, it nowhere reveals that in view of Section 4 of the Partition Act, the said right is available to the plaintiffs. Though learned counsel for the plaintiffs relied upon the decisions in the cases of **Jagmohan and anr vs. Badri Nath and ors, reported in 2024 3 SCC 588**, the same is not applicable in the light of the facts of the present case.

37

35. Issue of right to sue has not been defined, but the said expressions has been considered in several decisions of the Hon'ble Apex Court. In the case of **State of Punjab and ors vs. Gurdev Singh Ashok Kumar, reported in (1991)4 SCC 1**, the said expression was explained, as "the words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

36. Under Order VII Rule 11 of the CPC, the duty is cast upon the court to determine whether the plaint discloses a cause of action, by scrutinizing the averments

38

in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

37. In **Srihari Hanumandas Totala vs. Hemant Vithal Kamat**, reported in (2021)9 SCC 99 the Hon'ble Apex Court laid down principles to be considered while deciding an application. It is also admitted fact that cause of action is required to be pleaded and proved for the purposes of claim in the suit and the aforementioned materials are required to be stated.

38. On applying these principles, admittedly even on a formal reading of the plaint there is no pleading by which custom or the law the right of pre-emption is accrued to the present plaintiffs. None of essential conditions requisite are pleaded in the case. In fact, no cause of action is at all disclosed. In view of the decision of this court in the case of **Ramnath vs. Narayan** *supra*, the right

39

of pre-emption arises either by virtue of personal law or custom or statute. The the right of pre-emption does not arise in respect of property sold in execution of a decree when such right is claimed under the personal law or custom. The right of pre-emption is only a personal right. Unless the right of pre-emption is expressly conferred by statute, the right cannot arise in respect of involuntary sales. The right of pre-emption does not arise in respect of property sold in execution of a decree when such right is claimed under the personal law or custom. As far as pleading is concerned, it nowhere shows that the right of pre-emption is expressly conferred by statute. As far as Section 4 of the Partition Act is concerned, the same is not applicable to the present case. The suit is also barred in view of Section 47 of the CPC.

39. The remedy under Order VII Rule 11 is an independent and special remedy, wherein the Court is

40

empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision. The underlying object of Order VII Rule 11 (a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11 (d), the Court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. The whole purpose of conferment of such power is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the Court, and exercise the mind of the respondent. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to. Under Order VII Rule 11 of the

41

CPC, the duty is cast upon the court to determine whether the plaint discloses a cause of action, by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

40. In the light of the above observations and the law laid down in the cases *supra*, the pleading of the plaintiffs nowhere show how the said right of pre-emption is accrued to the plaintiffs by personal law or the custom. The suit property is already sold out by the order of the court in execution of the decree. Moreover, the suit is barred in view Section 47 of the CPC.

41. For all above these grounds, the civil revision application deserves to be allowed and it is **allowed**. The order passed by learned CJSD, Akot below Exh.23 rejecting the application under Order VII Rule 11 of the

42

CPC in Special Civil Suit No.3/2022 dated 9.6.2022 is hereby quashed and set aside. Consequently, the plaint is rejected.

42. Civil Revision Applications stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!