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

**SECOND APPEAL NO. 547 OF 2019**

1) Smt. Sumati @ Asha Wd/o Anil Subhedar,
Aged about 71 years, Occ. - Retired,

2) Shri Deodatta S/o Anil Subhedar,
Aged about 46 years, Occ.- Advocate,

3) Shri Nishikant S/o. Kashinath Subhedar,
Aged about 71 years, Occ.- Retired,

All R/o. Plot No. Q-21, Laxmi Nagar,
Nagpur- 22. .... **APPELLANTS**

// **VERSUS** //

1) Smt. Yashodhara Wd/o Sunil Subhedar,
Aged about 75 years, Occu. - Retired,

2) Shri Rutvik S/o Sunil Subhedar,
Aged about 43 years, Occ. - Advocate,

Nos.1 and 2 both R/o. Plot No.82,
Laxmi Nagar, Nagpur 22.

3) Smt. Gayatri W/o Amit Pande,
Aged about 49 years, R/o. Housewife,
R/o. 7, Bhagwaghar Lay Out,
Dharampeth, Nagpur.

4) Shri Subhash S/o Kashinath Subhedar(**Dead**)
through his Legal Representatives :

4(a) Smt. Sumedha Wd/o Subhash Subhedar,
Aged about 72 years, Occ.-Housewife,

4(b) Shri Kartik S/o Subhash Subhedar,
Aged about 46 years, Occ.-Service,

4(c) Mrs. Kalyani W/o Rakesh Choudhary,
Aged about 50 years, Occ.-Service,

All R/o. Plot No. N-5, Shreerang Apartment,
Near Aath Rasta Chowk, Laxminagar,
Nagpur – 440 022.

5) Shri Satish S/o Sudarshan Lade,
Aged adult, Occ.- Business,

6) Smt. Pratibha W/o Satish Lade,
Aged Adult, Occ.- Business,

No.5 to 6 R/o. Plot No.4,
Public Co-operative Housing Society,
Atre Lay Out, Nagpur – 22. .... RESPONDENTS

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Mr. N. R. Bhishikar, Advocate for Appellants.
Mr. S. P. Dharmadhikari, Senior Advocate assisted by
Mr. A. A. Sambaray, Advocate for Respondent Nos.1 to 3.
Mr. R. R. Prajapati, Advocate for Respondent No.4(a) and (b).
Mr. R. A. Bhandakkar, Advocate for Respondent Nos.5 & 6.

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CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 21.08.2024.
DATE OF PRONOUNCING THE JUDGMENT : 25.10.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by learned District Judge-10, Nagpur in Regular Civil Appeal No. 409 of 2007, dated 25.06.2019. The said first appeal was preferred against the Judgment and decree passed by learned Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.126 of 2006 dated 02.05.2007.

2. Brief facts of the plaintiffs case are as under :

(i) The plot No.21 in Block No. Q, total area admeasuring 8000 sq.fts. (743.21 sq.mtrs.), situated at Scientific Co-operative Housing Society Limited, Nagpur which is portion out of the Khasra Nos. 4/1, 4/2, 7/2, 25, 26/1, 1-4 of Mouza Ajni City, Survey No.359, Sheet No.34 having Municipal Corporation house No.321, situated at Laxmi Nagar, Ward No.75, is the suit property.

(ii) The suit property was purchased by Late Kashinath Subhedar in the name of his wife Sushila Kashinath Subhedar by sale-deed dated 09.08.1962. A house was constructed on some part of it. The plaintiffs are residing in it. Sunil, Anil, Subhash and Nishikant are the sons of late Kashinath and late Sushilabai. They were residing jointly there. Kashinath died on 09.11.1987 and Sushilabai died on 15.12.2001. They executed their separate Wills of the suit property. Their first son Sunil died on 08.05.2003. His wife Yashodhara is defendant No.1 and her son Rutvik and daughter Gayatri are defendant Nos.2 and 3. Their second son Anil died on 22.07.2001. His wife Sumati @ Asha is plaintiff No.1 and her son Devdatt is plaintiff No.2. Their fourth son Nishikant is plaintiff No.3 and third son Subhash is defendant No.4.

(iii) It is the case of the plaintiffs that they have statutory right of pre-emption under Section 22 of the Hindu Succession Act, 1956 (for short the "Act of 1956") to purchase share of defendant Nos.1 to 4 in the suit property. Defendant Nos.1 to 4 have statutory obligation to give offer to the plaintiffs, if they are willing to transfer by sale their share in the suit property to any stranger. The plaintiffs contended that defendant Nos.1 to 3 have executed an agreement to sale of their undivided 1/4$^{th}$ share collectively in the suit property with defendant Nos.5 and 6. It was registered on 04.09.2005 for total consideration of Rs.34,00,000/-. The defendant No.4 sold his undivided 1/4$^{th}$ share to the defendant Nos.5 and 6 by registered sale-deed dated 03.01.2006 for consideration of Rs.17,00,000/-. Though, plaintiffs gave offer to the defendants that they are ready to purchase their share in the suit property and ready to pay prevailing market value of the suit property. However, the defendants have not paid any heed to them. Therefore, the plaintiffs were constrained to file suit to exercise right of pre-emption in the suit property.

(iv) Defendant Nos.1 to 3 contended that they have offered to the plaintiff Nos.2 and 3 that they are willing to dispose of their share in the suit property. The plaintiffs have not paid any heed to them. Therefore, plaintiffs' right of pre-emption is lost and it is not in

existence. Defendant Nos.1 to 3 are not Class-I heirs of Sushilabai because late Sunil, husband of defendant No.1 and the father of defendant No.2 and 3 died on 08.05.2003 after the death of Sushilabai.

(v) The defendants' further contented that they and plaintiffs got suit property by Testamentary Succession as per the Will executed by Late Kashinath and late Sushilabai. They got share in the suit property by testamentary succession. Therefore right of pre-emption as per Section 22 of the Act of 1956 is not accrued to the plaintiffs. They prayed to dismiss the suit. Defendant Nos.1 to 3 have filed the Counter-claim and prayed for partition of their share in the suit property.

(vi) Defendant No.4 contended that he got the 1/4$^{th}$ share under the Testamentary Succession as per the Will executed by Late Sushilabai, therefore, Section 22 of the Act of 1956 is not applicable to the case of plaintiffs. It is further contended that two Wills executed by Kashinath and Sushilabai were within the knowledge of plaintiffs. They have suppressed this material fact. It is further contended that when he gave an offer to the plaintiffs to purchase his share as he intending to purchase the neighbour's flat at Thane in the

year 2002, the plaintiffs have not responded and refused to purchase his share in the suit property. Therefore, his alternate plea is that the plaintiffs have lost the right of pre-emption to purchase his share in the suit property. He was in the exclusive possession of his 1/4$^{th}$ share in the suit property which he handed over to the vendee. It is prayed to dismiss the suit.

(vii) The suit was dismissed and the counter claim filed by defendant Nos.1 to 3 for partition was decreed. The first appeal filed by the appellants was also dismissed and decree for partition passed by trial Court was confirmed.

3. Following substantial questions of Law are formed :

*(1) Whether both the Courts below erred in not considering the registered Sale Deed dated 09.08.1962 in favour of Late Sushilabai with respect to the Suit Property, which clearly confers an absolute title to her in the Suit Property and the same is further confirmed by operation of Section 14 (1) of Hindu Succession Act?*

*(2) Whether the Learned Trial Court and Hon'ble Appellate Court erred in travelling beyond the pleadings of rival parties and holding that the suit property devolved upon the legal heirs of Late Kashinath after his death?*

(3) *Whether in light of Agreement to sell dated 04.11.2005 and handing over possession of the suit property under the same to defendant Nos.5 and 6 such prayer for partition at the instance of defendant Nos.1 to 3 is tenable in view of Section 22 of the Specific Relief Act which gives such a right only to the transferee i.e. defendant Nos.5 and 6 and not to the transferor i.e. defendant Nos.1 to 3, in any case such a counter claim at the instance of transferor tends to defeat the valuable right accruing to the plaintiffs under Section 4 of the Partition Act?*

(4) *After the communication dated 08.09.2003 addressed by defendant No.4 to the Society vide Exhibit No.179 making clear his intentions to settle at Nagpur, that too in the suit property, no occasion arose for him to make an offer under Section 22 of the Hindu Succession Act, 1956 to the plaintiffs. However, when defendant Nos.1 to 4 vide Exhibit No.169 proceeded to sell their respective shares to defendant Nos.5 and 6, in preference to the right of the society and further sought no objection from the Society whether or not plaintiffs were entitled to receive the same offer from defendant Nos.1 to 4 as contemplated under Section 22 of the Hindu Succession Act, in preference over defendant Nos.5 and 6, who are strangers to the family?*

(5) *Whether the decree for partition in favour of defendant No.4 is permissible in teeth of the fact that defendant*

*No.4 had already sold his undivided share in the suit property to the defendant Nos.5 and 6.*

4. Admitted facts are as follows :

(i) The relationship between plaintiffs and defendants is not disputed.

(ii) The defendant No.4 sold his 1/4th share in the suit property to the defendant Nos.5 and 6 by sale-deed dated 03.01.2006.

(iii) The defendant Nos.1 to 3 have executed a Contract of sale of their 1/4$^{th}$ share in the suit property with defendant Nos.6 and 7.

(iv) Prior to sale of a share of the defendant No.4, he sent letters to the plaintiff Nos.2 and 3 dated 01.12.2001 and 03.04.2002 at Exhibit Nos.147 and 149 and gave offer to them to purchase his share in the suit property. These letters were not replied by them. Lastly, by letter dated 10.04.2002 at Exhibit-150, defendant No.4 communicated late Sunil - the husband of plaintiff No.1 and father of plaintiff Nos.2 and 3 that I do not want to sale his share in the suit

property to any other person than our family. But there was no any response from the plaintiffs.

5. The requirement and object of Section 22 of the Act of 1956 are as follows :-

(i) For claiming pre-emption right it must be immovable property of Hindu intestate. There must be an interest in any immovable property of an intestate. It means if a Will is executed by its owner then the Section 22 of the Act of 1956 is not applicable.

(ii) It is co-heirs conditional prefrential right to purchase share of other co-heir. It is not absolute right.

(iii) The immovable property may be his/her sole business or business carried out in conjunction with others.

(iv) Such interest must devolve upon two or more Class-I heirs as per the Schedule of the Act of 1956. The plaintiff and defendant must be Class-I heir as per Schedule to claim right of pre-emption. The said Schedule as per Section 8 of the Act of 1956 is applicable to the succession of Hindu male who dies intestate. It is not

applicable to the property of Hindu female, who dies intestate.

(v) Any one of such Class-I heir of the Schedule of the Act of 1956 must propose to transfer his undivided interest in the such property or business. If co-heir is not willing to transfer his share, he cannot be compelled to transfer it to other co-heir.

(vi) A willing other Class-I co-heir has a preferential right to purchase share of other co-heir. The heir who is ready to pay highest consideration for that transfer of share shall be preferred.

(vii) If there is no any agreement between the co-heirs about consideration amount of such share, then the Court can decide it in a proceeding before it, if an application is filed by a willing purchaser for determination of price of share of other co-heir.

(viii) If a sale offer is not given or made by co-heir and he transfer's his share to a stranger, Class-I heir has right to file suit for enforcing right of pre-emption.

(ix) The purchaser Class-I heir must be willing to purchase the property of co-heir. It means he must be ready to pay the consideration amount of the share of co-heir in that property.

(x) The suit to claim such right of pre-emption must be filed within one year from the date of sale-deed of share of Class-I heir as per Article 97 of the Limitation Act, 1963.

(xi) If partition of such property has been taken between Class-I heirs, the right of pre-emption is not available and it cannot be enforced.

(xii) The object of Section 22 of the Act of 1956 is to maintain family privacy and to avoid entrance of stranger in the house property or business of Hindu family.

NATURE OF SUIT PROPERTY

6. Learned Advocate Mr. Bhishikar for the appellants submitted that it is admitted fact that sale-deed of suit property dated 09.08.1962 was executed in favour of Late Sushilabai. As per Section 14(1) of the Act of 1956, if any property is purchased in the name of Hindu female, she becomes absolute owner of it as per Section 14(1)

of the Act of 1956. Thus, by that sale-deed, she had become absolute owner of the suit property.

7. Learned Advocate for the appellants further submitted that the alleged Will of Late Sushilabai is not proved and there is concurrent findings of both Courts regarding it. Though alleged Will of late Kashinath, the husband of late Sushilabai is proved, he was not having any right, title and interest in the suit property to execute a Will. Therefore, suit property is subject matter of pre-emption. These factual and legal aspect were not considered by both the Courts properly. He, therefore, prayed to hold that suit property is absolute property of Late Sushilabai as per Section 14(1) of the Act of 1956. Once it is held that it is her absolute property, a Will of Kashinath goes out of consideration. Hence, the stand of the defendants that there was a Will of late Kashinath is not sustainable. Hence, it be held that Kashinath's Will is not useful to the respondents.

8. The trial Court as well as first appellate Court held that a Will of late Sushilabai is not proved. The appeal or cross-objections are not preferred against it by the respondents. Learned Advocate for the appellants is relying upon the bunch of authorities about Section

14(1) of the Act of 1956. But those are not referred here as the said facts and law are not disputed by the advocates for the respondents in their arguments. Therefore, it is held that late Sushilabai died intestate and suit property was her absolute property as per Section 14(1) of the Act of 1956. Therefore, it is held that late Kashinath was not having right in the suit property to execute a Will. Therefore, though his Will is proved, it has no legal effect on the suit property. The trial Court and first appellate Court erred in this regard. Therefore, the substantial question of law Nos.1 and 2 are answered in the affirmative.

**OFFER, WILLINGNESS AND CONSIDERATION OF SUIT PROPERTY.**

9. Learned Advocate for the appellants pointed out the letters sent to appellants at Exhibit-147 dated 01.12.2001 and Exhibit-149 dated 03.04.2002 by which respondent No.4 gave an offer to sale his share in the suit property to the appellant No.3. A letter sent to the Sunil, husband of plaintiff No.1, is at Exhibit-150. It is admitted fact. He further pointed out the communication between respondent No.4 and the Co-operative Housing Society at Exhibit-179, in which his clear intention to stay and settle at Nagpur is shown. That time offer was not given to the appellants. The respondents sought permission to sale their share in the suit property

vide Exhibit-169. However, that time an offer to sale his share to the appellants was not given.

10. Learned Advocate for the appellants further submitted that the letters Exhibit Nos.147, 149 and 150 shows initial willingness of appellant No.3 as some amount was paid by him to the respondent No.4 that he is ready to purchase his share in the suit property. The willingness to purchase the suit property on the part of appellant No.3 can be clearly gathered from these letters, which are admitted by both sides. Learned Advocate for the appellants further submitted that appellants were willing to purchase the share of the respondents however, respondents Nos.1 to 3 have not given an offer to the appellants that they are willing to sale their share in the suit property. He pointed out that in the month of September 2003, respondent No.4 decided to settle at the Nagpur. Thereafter respondent No.4 submitted a letter Exhibit-179 to the Co-operative Housing Society that he had decided to stay at Nagpur. Thereafter, he did not give any offer to the plaintiffs that he is selling his share in the suit property. He, therefore, submitted that it can be gathered from the conducts of the respondent Nos.1 to 4 that they denied the right of pre-emption of the appellants.

11. Learned Senior Counsel for the respondents pointed out that in the year 2001 and 2002, the letters at Exhibit Nos.147 and 149 were sent to the appellant No.3 by respondent No.4 for sale and fixing price of his share in the suit property. Admittedly the letter at Exhibit-150, the appellants have not responded positively to the offer of respondent No.4. The right of pre-emption was not in existence thereafter for the appellants, as their conduct shows that they were not willing to purchase the suit property. The contents in the letter shows that they were not having sufficient consideration amount for purchasing share of the respondent No.4. He therefore, submitted that learned trial Court and first appellate Court rightly appreciated the evidence in this regard and interference is not warranted in it as there is concurrent findings of both Courts on these facts. He is relying upon the case of ***Dr. Kailashchandra S/o Ramchandra Mishra Vs. Damodar S/o Balabax (deceased) through LRs. Smt. Reva Devi W/o Damodar Mishra & Ors.***, reported in ***2020(2) M.P.L.J. 40***, para 36 reads as under :

> *"36. From perusal of the said statement, it is clear that the respondent No.1 has offered to sale the property to the plaintiff but the plaintiff did not turn-up to purchase the said property and therefore, it cannot be said that the sale-deed executed in favour of respondents No.2 and 3 by the respondent No.1 is null and void."*

12. It is admitted fact that letters Exhibit Nos.147 and 149 were sent by respondent No.4 to the appellant No.3 and the letter Exhibit-150 was sent to husband of appellant No.1, who is no more. The letters were not replied. His intention to sell his share in the suit property to appellants is crystal clear from these letters. The burden of proof lies upon the appellants to prove that they were willing to purchase share of respondent No.4 in the suit property and that they were having that entire amount of consideration of his 1/4$^{th}$ share in the suit property to pay it to him. However not giving response by appellant No.3 shows their intention that appellants were not willing to purchase suit property. The sending of letters is admitted fact. Contents in the letter are clear that appellants were economically not able to purchase the suit property. Thus offer was given to the appellants but there was no any response on their part. Hence, by obtaining permission from the Society, suit property was sold by the respondent No.4. Earlier to that appellants lost their right of pre-emption.

13. It is not averred in the plaint by the appellants that they are ready to pay consideration of Rs.60,00,000/- of the shares of defendants in the suit property. It was not deposited in the trial Court by the appellants to show their willingness to purchase the suit

property. Once their offer is denied, it cannot be expected from the respondent Nos.1 to 4 to give such offers again and again to the appellants. The previous and subsequent conduct of silence on the part of appellants as per Section 8 of the Indian Evidence Act, 1872 is established which shows that they were not willing to purchase the share of respondent No.4 in suit property. In para 127 of the judgment of first appellate Court it is concluded that appellants were fully aware about that correspondence and offers given to them. However, they have not taken further steps to accept an offer of respondent No.4. They failed to fulfill their liability. In view of finding about said fact, there is no scope for interference, as no any perversity is shown regarding the appreciation of evidence in the both judgments in this regard. Unless there is procedural error no interference in that findings is permissible in second appeal as per law laid down by the Hon'ble Supreme Court in the case of ***Gurnam Singh (Dead) by legal representative and others Vs. Lehna Singh (Dead) by legal representatives***, reported in ***(2019) 7 SCC 641***.

14. There is concurrent findings of the fact by both the Courts. The evidence is properly appreciated by both the Courts in this regard. There is no scope for interference in findings in the judgment and decree of trial Court as well as first appellate Court in

this regard. Hence, substantial question of law No.4 is answered in the negative.

RIGHT TO CLAIM PRE-EMPTION AND PARTITION.

15. Learned Advocate for the appellants submitted that the respondent No.4 sold his 1/4th share in the suit property by sale-deed to them. The respondent No.4 now cannot claim partition. He therefore, submitted to dismiss the counter-claim and set aside the impugned judgment and decree of partition granted illegally in favour of defendants.

16. Learned Senior Counsel for the respondents argued that respondent Nos.1 to 3 have claimed partition of their share in the suit property by filling counter claim. They have right to file suit for partition. Therefore, it cannot be held that counter claim for partition is not maintainable.

17. Learned Senior Counsel for the respondents submitted that the appellant Nos.1 to 3 are not Class-I heirs of late Sushilabai as per the requirement of Section 22 of the Act of 1956. The right to sue for pre-emption is only provided to the Class-I heirs. The Anil died before the death of Sushilabai on 08.05.2003, his son and his wife

who are appellant Nos.1 and 2, they are not Class-I heirs of the late Sushilabai. Therefore, appellant's have no right to file suit for exercising right of pre-emption as per basic requirement of Section 22 of the Act of 1956.

18. Learned Advocate for the appellants argued that late Sushilabai is absolute owner of suit property and she died intestate. Therefore, the appellants have right of pre-emption to purchase share of the defendant Nos.1 to 4. He is relying upon the following authorities :

(i) ***Shyam Sunder & Ors. Vs. Ram Kumar & Anr.***, reported in ***AIR 2001 SC 2472***, in which it is held that,

> *"The reason being the right of pre-emption of a co-sharer is an incident of property attached to the land itself. It is some sort of encumbrance carrying with the land which can be enforced by or against the co-owner of the land. The main object behind the right of pre-emption either based on custom or statutory law is to be prevent intrusion of stranger into the family holding or property. A co-sharer under law of pre-emption has right to substitute himself in place of stranger in respect of portion of the property purchased by him meaning thereby where a co-sharer transfers his share in holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding in an area where law of pre-emption prevails. Such a right at present may be characterised as archaic, feudal and out-moded but this was law for nearly two centuries*

*either based on custom or statutory law. It is in this background the right of pre-emption under statutory law has been held to be mandatory and not mere discretionary. The Court has no option but to grant decree of pre- emption where there is a sale of a property by another co-sharer."*

(ii) ***Suresh Prasad Singh Vs. Dulhin Phulkumari Devi & Ors.***,

reported in ***2010 AIR SCW 3994***, para 13 reads as under :

*"13. The learned Single Judge deciding the writ petition and the Division Bench of the High Court deciding the L.P.A. appear to have taken a view that the right of pre-emption is a weak right, presumably because the Division Bench of Patna High Court in Sudama Devi v. Rajendra Singh (AIR 1973 Patna 199) and learned Single Judge in Ram Pravesh Singh v. The Additional Member, Board of Revenue and Others (supra), has taken this view. Whatever may have been the views of the Patna High Court and this Court in the earlier decisions cited by learned counsel for the respondent No.1, a five Judge Bench of this Court in Shaym Sunder & Ors. v. Ram Kumar & Anr. (supra) has now held that where a right of pre-emption is recognized by statute, it has to be treated as mandatory and not discretionary. The relevant passage from the judgment in Shaym Sunder & Ors. v. Ram Kumar & Anr. (supra) is quoted herein below:*

*"17. .....The right of pre-emption of a co-sharer is an incident of property attached to the land itself. It is some sort of encumbrance carrying with the land which can be enforced by or against the co- owner of the land. The main object behind the right of pre-emption, either based on custom or statutory law, is to prevent intrusion of a stranger into the family-holding or property. A co-sharer under the law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of*

*the property purchased by him, meaning thereby that where a co-sharer transfers his share in holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding in an area where the law of pre-emption prevails. Such a right at present may be characterisd as archaic, feudal and outmoded but this was law for nearly two centuries, either based on custom or statutory law. It is in this background the right of pre-emption under statutory law has been held to be mandatory and not mere discretionary.....".*

*Thus, even if there has been a long lapse of 19 years, the High Court could not have rejected the claim of the appellant for pre-emption when the claim was recognized by the statute, had been lodged in accordance with the statute and within the time prescribed by the statute and in the manner provided by the statute."*

(iii) ***Bishan Singh & Ors. Vs. Khazan Singh & Anr.***, reported in ***AIR 1958 SC 838***, para 11 reads as under :

*"**11**. 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. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee. Courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendeeire, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre- emptor with preferential or equal right. To summarize: (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 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."*

(iv) ***Smt. Mattoo Devi Vs. Damodar Lal (Dead) by LRs. & Ors.***,

reported in ***AIR 2001 SC 2611***, in which it is held that :

> *"In Talab-e-muwathaba the pre-emptor must assert his claim immediately on hearing of sale though not before and law stands well settled that any unreasonable delay will be construed as an election not to pre-empt. The second, being popularly known as the Second Demand, is talab-e ishhäd, which literally speaking mean and imply the demand which stands witnessed. The second demand thus must be in reference to the first demand and it is so done in the presence of two witnesses and also in the presence of either the vendor (if he is in possession) or the purchaser and the Third Demand though not strictly a demand but comes within the purview of the Principal and means initiation of legal action. It is however not always necessary since it is available only when one enforces his right by initiation of a civil suit such an action is called talab-e tamlïk or talab-e khusümat. In this form of Talab the suit must be brought within one year of the purchaser taking possession of the property and a suit*

*or claim for pre- emption must relate to whole of the interest and not a part of the estate."*

19. Nobody will dispute the ratio laid down in the above authorities. However, each case must be decided on its own merit.

20. Learned Senior Counsel for the respondents further argued on the scope of Section 100 of Code of Civil Procedure, 1908 (for short the "CPC"). For that, he is relying upon the authorities, but law laid down in those authorities are not disputed by the Counsel for the appellants hence, those are not referred here.

21. It would be proper to consider the ambit and scope of Section 22 of the Act of 1956.

22. The right to file suit for pre-emption under sub-Section 1 of Section 22 of the Act of 1956 accrues when property devolves upon two or more heirs specified in Class-I of Schedule of the Act of 1956. The said Schedule only applies to the succession of Hindu males property who dies intestate as per Section 8 of the Act of 1956.

23. The succession of Hindu female's property who dies intestate is governed by Section 15 and 16 of the Act of 1956 and not governed by Section 8 of it. The Schedule as per Section 8 of the Act

of 1956 is not applicable to the Hindu females property. Her legal heirs appellants and respondent Nos.1 to 4 are not Class-I heir.

24. In sub-Section 1 and 3 of Section 22 of the Act of 1956, the legal terminology "**heirs specified in Class-I of Schedule**" is used for twice. Emphasis is given to the "**Class-I heirs of Schedule**" of the Act of 1956. This shows intention of legislature that only the property of Hindu male dying intestate will be subject matter of suit for claim of right of pre-emption. The suit property of late Sushilabai is absolute property of Hindu female as per Section 14(1) of the Act of 1956. The succession to her property is governed by Section 15 of the Act of 1956. The Schedule-I is not applicable to the succession of legal heirs of late Sushilabai, who is a Hindu female. In Section 15 and 16 of the Act of 1956, category like Class-I heirs is not provided. Thus, appellants and respondents Nos.1 to 4 are not Class-I heirs of late Sushilabai as per Schedule of the Act of 1956, which is applicable to the property of Hindu males only. As per requirement of Section 22 of the Act of 1956 heirs must be Class-I heir. The legal status as Class-I heirs is applicable only to the Hindu males legal heirs dying intestate as per Schedule and Section 8 of the Act of 1956. Therefore, appellants have no such legal right to file suit for right of pre-emption. The appellants and respondent Nos.1 to 4 are not Class-

I legal heirs of late Sushilabai as provided in Class-I of Schedule under Section 8 of the Act of 1956. They are her legal heirs as per Section 15 of the Act of 1956. Though legislature has used word "**her property**", however the legislature has not clarified in Section 22 of the Act of 1956 in respect of females property which type of her heirs are entitled for right of pre-emption. It is mistake of legislature. This Court has no such power to add something which is not in the statute. Such anomaly can be cured only by the legislature. The Court cannot treat her legal heirs as Class-I heirs for the purposes of the suit for right pre-emption. To achieve the object of pre-emption, it is intended by legislature that it must be the property of Hindu male who dies intestate and not Hindu female. Therefore term "**Class-I heir of Schedule**" is specifically used in Section 22 of the Act of 1956, which clarifies intention of legislature. Therefore, this appeal is liable to be dismissed on this basic and decisive aspects as discussed above that there is no such existence right of pre-emption available to the appellants to claim it.

25. Respondent Nos.1 to 3 have right to claim partition of their share in the suit property and by filing counter claim they prayed for it. In the partition suit, every plaintiff is defendant and every defendant is plaintiff. Though respondent No.4 had already

sold his undivided share in the suit property, it is duty of the Court to carve out the shares of all parties for complete and legal partition. The issue of partition is rightly adjudicated by the trial Court by carving out share of the respondent No.4 also. There is no any illegality and perversity in the impugned judgment of both Courts in this regard. There is no substance in the argument of learned Advocate for the appellants that counter claim for partition is not maintainable etc. As the appellants have no right to claim pre-emption, their case laws ***Shyam Sunder, Suresh Prasad Singh, Bishan Singh*** and ***Smt. Mattoo Devi*** cited *supra* are not helpful to them. Therefore, those are not discussed here. Hence, substantial question of law No.5 is answered in the negative.

## PRE-EMPTION RIGHT AS PER PARTITION ACT.

26. Learned Advocate for the appellant submitted that the appellants have also legal right to file suit for enforcing right of pre-emption under Section 4 of the Partition Act, 1893 (for short the, "Partition Act"). He submitted that as per Section 4 of the Partition Act, the appellants are legally entitled to claim right of pre-emption in the suit property.

27. Learned Senior Counsel for the respondents submitted that Section 4 of the Partition Act is not applicable to the facts of this case. He pointed out that respondent Nos.5 and 6 are the purchasers of 1/4th share of respondent No.4 out of suit property. They have not filed general suit for partition under Section 44 of the Transfer of Property Act, 1882. Unless such suit for partition is filed by purchaser, no such suit for pre-emption is maintainable as per requirement of Section 4 of the Partition Act. Therefore, Section 4 of the Partition Act is not applicable to the case in hand and no such question of law arises for consideration. He is relying upon the authority of ***Gautam Paul Vs. Debi Rani Paul & Ors.***, reported in ***(2000) 8 SCC 330***, in which it is held that the procedure i.e. an outsider should actually file a suit for partition and then the only preferential right to file suit under pre-emption arises.

28. By filing of counter-claim, respondents Nos.1 to 3 prayed for partition of the suit property. The respondent No.4 had not prayed for partition. They are legal heir of late Sushilabai as per Section 15 of the Act of 1956. The purchaser respondent Nos.5 and 6 have not filed counter claim or suit for partition. As per Section 4 of the Partition Act to claim right of pre-emption, the stranger purchaser must file general suit for partition. It is mandatory provision that no

such right to file suit under the caption of 'pre-emption' accrued to the appellants as the stranger purchaser has not filed suit for partition. A bare reading of Section 4 of the Partition Act, clarifies that no such substantial question of law arises for determination unless such right of pre-emption is accrued to the appellants. Therefore, argument of learned Advocate for the appellants is not acceptable in this regard. Bunch of case law is filed on behalf of appellants, but right does not accrue to the appellants to claim pre-emption, it is not helpful to the appellants. It is therefore not considered and discussed here. Hence substantial question of law No.3 is answered in the negative.

29. As per Section 100 of the Code of Civil Procedure and the law laid down by the Supreme Court in case of ***Gurnam Singh Vs. Lehna Singh***, reported in ***(2019) 7 SCC 461,*** unless there is error of law or error as to procedure or as to recording of evidence or its proper appreciation in second appeal, the High Court cannot interfere in the findings of the trial Court and first appellate Court. For the reasons discussed above, the case law cited supra on behalf of the appellants is useful for the appellants and it is not relied upon.

30. As far as decree for partition granted by the trial Court is concerned, it would be proper to allot the constructed area of suit house to the half share of the appellants as they are willing to reside there. Some of them are admittedly residing in the suit property. Remaining open ½ area of the suit plot can be allotted to the share of respondent Nos.1 to 4. For that appellants may be directed to pay the price of ½ share of that constructed house to the defendants Nos.1 to 4. It is because equity must be done while effecting partition of the suit property which is requirement of justice suiting to the facts of this case. To this extent decree for partition deserves to be corrected and modified. It is corrected accordingly so that final decree and partition would be effected by metes and bound. It is clarified that executing Court has to take note of these observations regarding modification of decree for partition.

31. The appellants have also filed an application bearing No.973/2021 for framing some additional substantial questions of law. But as discussed above, the right of pre-emption is not in existence to file the suit to appellants, which is decisive aspect of the case. Hence, the application deserves to be rejected as there is no any substantial question of law to be decided. It is rejected.

32. The application No.46/2023 is filed to produce the copy of sale-deed of suit property. The fact of execution of sale-deed is not disputed by both sides. The production of sale-deed is not necessary for adjudication of this appeal. The application is therefore rejected.

33. Except the findings on substantial question of law Nos.1 and 2, the suit is rightly dismissed and counter claim is rightly decreed by the learned trial Court. Learned first appellate Court also rightly dismissed the appeal filed by appellants. For the aforesaid reasons, all the substantial questions of law are answered accordingly. There is no substance in the grounds of objection of this appeal as there is no scope for interference in the judgments and decrees of the trial Court as well as first appellate Court.

34. The appeal deserves to be dismissed. The Appeal is **dismissed**. No costs.

**(SANJAY A. DESHMUKH, J.)**

1. After this judgment is delivered, learned Counsel for the respondents submits that execution proceedings bearing Final Decree Proceeding No.33 of 2019 is pending in the Court of 3rd Joint Civil

Judge, Senior Division, Nagpur. He submits that expeditious hearing and speedy disposal of the said proceedings is necessary.

2. The learned Counsel for the appellants submits that already Court Commissioner is appointed and execution of final decree proceeding is going on. Therefore, it is not necessary to give such direction.

3. Considering the fact that suit was filed in the year 2006. Now 18 years are over. It would be proper to give direction to the Executing Court to conclude the execution proceeding as early as possible and in any case within six months and dispose of the execution proceedings/Final Decree Proceeding No.33 of 2019 on merit by considering directions given in the para No.30 of this judgment.

(SANJAY A. DESHMUKH, J.)

*Kirtak*