



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

**SECOND APPEAL NO.4 OF 2007**

**APPELLANTS**

L.RS. Of Pltff. No.1(C)  
Smt. Vimal Hemant-kumar  
Mohabe died on 30.03.2000

- [1) Shri Hemantkumar s/o Shankarlal Mohabe, aged about 73 years, Occupation: Retired teacher, R/o. Akare's House Zenda Chowk, Chitnispura, Mahal, Nagpur ] - A-1 Dead
- 2) Smt. Sangita w/o Rishikesh Pashine, aged about 38 Yrs. Occupation: Housewife R/o. Grashim Staff Colony, Birla Gram, Nagda-456331.
- 3) Shri. Nitin S/o Hemantkumar Mohabe, aged about 34 years, Occupation: Service.
- 4) Shri Nilesh s/o Hemantkumar Mohabe, aged about 31 years. Occupation: Teacher.  
Both 3 and 4 R/o. Akara's House, Zenda Chowk, Chitnispura, Mahal, Nagpur.

**...VERSUS...**

**RESPONDENTS**

Ori. Deft. No.2

Ori. Def. No.1

- :1. Subhash Mohanlal Ujaoney, (since deceased) through his L. Rs.  
Smt. Kalawati Mohanlal Ujaoney (also since deceased), Through her L. RS.
1. Shobhiya w/o. Subhash Ujaoney, aged about 56 years, Occu. Housewife.

2. Sheetal w/o. Prashant Nashine, aged about 32 Yrs. Occupation: Housewife.
3. Sushant s/o. Subhash Ujaoney, aged about 31 years, Occupation: not known.

All R/o. Kunjivihar, near Coffee House Square, Dharampeth, Nagpur.

Ori. Deft. No.3

4. Manoharlal s/o. Mohanlal Ujaoney, aged 56 years, Occupation: Service.

Ori. Deft. No.4

5. Jaiprakash s/o. Mohanlal Ujaoney, aged about 49 yrs. Occupation: Service,

Ori. Deft. No.5

6. Ashutosh Alias Rajjain S/o. Mohanlal Ujaoney, Aged about 38 years, Occupation: Service, Nos. 4 to 6, R/o. Of Dharampeth, Nagpur

Ori. Deft. No.6

- Smt. Ashalata w/o. Prakash Prakash Mohabe (since deceased), through her L. RS.
7. Prakashchand s/o. Shyamlal Mohabe, aged about 80 yrs. Occupation: retired.
  8. Sagar s/o. Prakashchand Mohabe, aged about 46 yrs. Occupation: Service, Both R/o. 97, Kailash Park, Near Geeta Bhavan, Indore (M.P)

9. Nita w/o. Ranjit Katakwar, Aged about 30 yrs. Occupation: Housewife R/o. Pragati Colony, Station Road, Bhandara.
10. Smt. Mamta w/o. Anil Pashine, aged about 48 yrs. Occupation: Housewife, R/o. K-10, South Extension Park one, New Delhi.
- Ori. Deft. No.7 11. Ushalata Shailesh Mohabe, Aged about 59 Yrs. Occupation: Housewife, R/o. Near S.T. Stand, Bhilai, Tahsil and District: Bhilai.
- Ori. Deft. No.8 12. Smt. Ruplata Santosh Pashine, aged about 57 yrs. Occupation: Housewife, R/o. near Railway Station, Bhopal.
- Ori. Deft. No.9 13. Smt. Premlata w/o Ramkumar Gupta, aged about 58 yrs. Occu. Housewife, R/o. Baroda, Tahsil and Dist. Baroda (Gujarat)
- Ori. Pltff. No.1(b) 14. Smt. Kamal w/o. Krishnakumar Gupta, Aged about 68 yrs. Occ. Household, R/o. C/o. Aditya Gupta, Flat No. 8/2, Sanjay Complex, Near Mata Mandir, Bhopal – 462003 (M.P.)
- L.R. of Ori. Pltff.  
Mohabe, died on 30.03.2000 15. Smt. Nivedita w/o. Virendra Vimal Hemantkumar Tarhate, aged about 38 yrs. Occupation: Teacher, R/o. C/o. Surendra Kumar Tarhate, Pandhrabodi, Ramnagar, Nagpur.

- Ori. Pltff. No.1(d) **16.** Dr. Prabha w/o. Likhiram Malviya, aged about 64 yrs., Occupation: Medical Practitioner, R/o. 5, Buti Layout, Rajnagar Chhaoni, Nagpur – 440 013.
- Ori. Pltff. No.1(e) **17.** Smt. Malti w/o. Chandraprakash Mahajan, Aged about 62 yrs. Occupation: Household, R/o. behind Sharda Talkies, Pushpkunj Colony, Gorakhpur, Jabalpur (M.P).
- Ori. Pltff. No.1(f) **18.** Ku. Mamta D/o. Narayanlal Ujaoney, aged about 60 yrs. Occupation: Household, R/o. C/o. B.K. Nashine Stationpura, Rajnandgaon (Chhatisgarh).
- Ori. Pltff. No.1(g) **19.** Smt. Maya w/o. Brijkishor Nashine, aged about 58 yrs. Occupation: Household, R/o. Stationpura, Rajnandgaon, (Chhatisgarh).
- Ori. Pltff. No.1(h) **20.** Smt. Madhuri w/o. Anand Kharabe, aged about 56 yrs. Occ. Household, R/o. Patrakar Colony, 1/5, Near Maharajbagh Garden, Amravati Road, Nagpur.
- Ori. Pltff. No.1(i) **21.** Smt. Alka w/o. P.N. Katakwar Aged about 54 yrs. Occupation: Household R/o. Sadoday Nest, Mental Hospital square, Koradi road, Nagpur-440013 (M.S.)
- L.R. of Original Plff. No.1(j) Smt. Sunita Jawaharlal Ujaoney. **22.** Shri Raju s/o. Jawaharlal Ujaonoy, aged about 45 yrs. Occupation: Service, R/o. Manorama Apartment, Near Mahalaxmi

Apartment, Canal Road, Gokulpeth,  
Nagpur-440010.

L.R. of Original Pltt. No.1(j) Smt.  
Sunita Jawaharlal Ujaoney.

**23.** Smt. Renu w/o. Rahul Suhalka,  
aged about 40 yrs. Occupation:  
Household, R/o. 5<sup>th</sup> Floor  
Gulmohar Colony, near Thakuar  
Polytechnic College, Borivali,  
Mumbai.

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Ms. S. R. Pashine, appellant in person (through V.C.)  
Mr. V. V. Tekade, Advocate for Appellant No.3.  
Mr. M. R. Joharapurkar, Advocate for the Respondent No.6.

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**CORAM : ROHIT W. JOSHI, J.**

**DATE OF RESERVATION : 12.12.2025**

**DATE OF PRONOUNCEMENT : 25.02.2026**

**J U D G M E N T :**

1) Heard finally with consent of learned advocate for the respective parties.

2) The present appeal is filed in order to challenge judgment and decree dated 25.04.2006 passed by the learned 7<sup>th</sup> Ad-hoc Additional District Judge, Nagpur in Regular Civil Appeal No.344 of 1998, whereby decree for partition and separate possession passed by the learned 4<sup>th</sup> Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.204 of 1976 came to be reversed and the aforesaid suit for partition

and separate possession came to be dismissed.

3) Vide order dated 27.08.2007, the appeal came to be admitted on the following substantial question of law:-

*“Whether a suit between the parties would be barred by the provisions of **res judicata**, in view of an arbitration award passed in proceedings between the parties under the Arbitration Act ? ”*

4) Thereafter another substantial question of law was framed in the appeal vide order dated 03.11.2025, which reads as under:-

*“Whether the findings recorded by the learned First Appellate Court that the suit for partition was barred by limitation are legally sound, having regard to the fact that the suit is filed in the year 1973 and there appear to be statements up to the year 1968 regarding the property being joint?”*

5) The suit property is an NIT Leasehold Plot bearing No.287 situated at Dharampeth, Nagpur. The original plaintiff and defendant were real brothers. They have

obtained the suit property on lease from Nagpur Improvement Trust, Nagpur (NIT), vide Lease Deed dated 14.07.1950. Both plaintiff and defendant have expired and their legal representatives are contesting litigation.

6) It is not in dispute that initially there was a dispute in the family in relation to the partition of the properties and one Shri. L. M. Bhagwat, an Advocate at Bhandara was appointed as arbitrator for effecting partition of the properties between the brothers.

7) Initially, the suit was filed on 28.07.1973 and it was registered as Civil Suit No.1212 of 1973. However, the defendants had raised an objection with respect to pecuniary jurisdiction, which was accepted and order of return of plaint was passed, thereafter, the plaint was presented in the Court of Civil Judge, Senior Division on 30.06.1976 and was re-registered as Special Civil Suit No.205 of 1976.

8) It is the case of plaintiff that 02.10.1961, the brothers arrived at mutual settlement for partition of the suit property. The defendants disputed the said partition. The plaintiff's claimed decree for possession with respect to part

of suit property which fell to his share as per arbitral award and alternatively sought decree for partition and separate possession.

9) The case of defendants is that the house property is their exclusive property. They have admitted that Shri. Bhagwat was appointed as Arbitrator for effecting partition of the properties. They have contended that the agreement dated 02.10.1961 was never implemented and have also pleaded ignorance about such agreement arrived at before the arbitrator. It was further contended that the plaintiff was ousted from the suit property in the year 1960 itself and therefore the suit filed on 28.07.1973 was barred by limitation. The defendants further contended that the arbitrator had instituted a suit being Special Civil Suit No.8 of 1964 to make the award rule of the Court as contemplated under the Arbitration Act, 1940. It is contended that the learned Trial Court had directed the plaintiff to pay deficit stamp duty vide order dated 11.12.1964 on the arbitral award. The plaintiff challenged the said order before this Court in Civil Revision No.85 of 1965, which was withdrawn.

It is stated that the order dated 11.12.1964 directing payment of stamp duty was not complied with and the suit came to be dismissed vide order dated 28.02.1968. The contention of the defendants is that subsequent suit for partition based on the same cause of action was not maintainable since earlier suit, i.e., Special Civil Suit No.8 of 1964, was dismissed on account of failure on the part of plaintiff to make compliance of order directing payment of stamp duty on the arbitral award.

**10)** The learned Trial Court held that the agreement dated 02.10.1961 between plaintiff and defendant was not proved and further that the defendants had proved that the said agreement was not acted upon. However, the learned Trial Court held that the plaintiff and defendant had equal share in the suit and has accordingly granted a decree for partition and separate possession. It needs to be stated that objection with respect to the suit being barred by limitation came to be rejected by the learned Trial Court.

**11)** The legal representatives of original defendant preferred appeal challenging the said judgment and decree

for partition passed by the learned Trial Court. The appeal came to be registered as Regular Civil Appeal No.344 of 1998. The learned First Appellate Court has allowed the appeal on the ground that suit for partition was not maintainable in view of dismissal of Special Civil Suit No.8 of 1964, which was filed to make arbitral award rule of the Court and that the defendants had perfected their title by adverse possession, which implied that the suit was barred by limitation.

12) The present Second Appeal is preferred by legal representatives of original plaintiff No.1(C), being aggrieved by the decree passed by the learned First Appellate Court allowing the appeal and thereby dismissing the suit for partition.

**AS TO SUBSTANTIAL QUESTION OF LAW NO.1.**

*“Whether a suit between the parties would be barred by the provisions of **res judicata**, in view of an arbitration award passed in proceedings between the parties under the Arbitration Act ? ”*

13) Although the substantial question of law pertains to *res judicata*, the learned advocates did not seriously dispute that, since earlier suit filed for making the award, rule of the Court was not decided on merits, a fresh suit will not be barred by *res judicata*. Both sides made submissions with respect to maintainability of the suit in view of dismissal of earlier suit filed for making the award rule of the Court. The contentions revolved around maintainability of the suit with respect to a right, which was also subject matter of the earlier suit, which was dismissed on account of failure on the part of plaintiff to pay appropriate stamp duty on the award in compliance of order passed by the Court.

14) The learned advocate for the appellant contended that provisions of Order II Rule 2, Order IX Rule 7 and Order XXIII Rule 1 of the Code of Civil Procedure, 1908 are not applicable to a suit for partition and separate possession. The learned advocate contends that right to seek partition and separate possession of a joint property is a recurring right and therefore even if earlier suit is dismissed in default or is withdrawn without liberty to institute a fresh suit, a

subsequent suit for partition and separate possession is not barred since it arises out of a subsequent cause of action. He submits that the arbitral award under the erstwhile Arbitration Act did not become enforceable unless it was made rule of the Court and therefore merely because an arbitration award for partition was passed, the same will not bar a subsequent suit for partition and separate possession. The learned advocate for the appellant contends that the learned First Appellate Court has erred in not taking into consideration this vital aspect of the matter.

**15)** Per contra, the learned advocate for the respondents/defendants argues that even when an arbitration award is not made rule of the Court, it cannot be discarded completely. He contends that since in earlier round of litigation an arbitration award for partition was passed, it was necessary for the plaintiff to pursue the said proceeding and to get the same adjudicated in accordance with law. The learned advocate contends that having failed to pursue the proceeding after the stage of passing of arbitration award, the plaintiff cannot institute a separate suit for the same purpose,

i.e., partition and separate possession.

16) He has placed reliance on the following decisions in support of his contention:-

- i. *M/s. Prataprai Manmohandas Vs. Ms. Shivnarayan Balal and Co.* reported in *AIR 1956 Bombay*.
- ii. *Firm Gulzarimal Gheesalal Vs. Firm Rameshchandra Radhyeshya*, reported in *AIR 1959 Rajasthan 162*.
- iii. *Satishkumar and ors. Vs. Surinderkumar and ors.*, reported in *AIR 1970 SC 833*.
- iv. *M/s. Deluxe Silk Traders Vs. M/s. Satyanarayan Mahendrakumar and ors.*, reported in *AIR 1979 Bombay 149*.
- v. *Kehar Das Vs. Tarak Singh and anr*, reported in *AIR 1977 Punjab and Haryana 306*.
- vi. *Union of India and ors. Vs. Manager, M/s. Jain and Associates*, reported in *AIR 2001 SC 809 equivalent citation 2001 (3) SCC 277*.

17) The ratio of the above judgments is that once an award is passed in an arbitration proceeding, the said award is binding between the parties and the same cannot be discarded merely because it is not made rule of the Court. It is held that once an award is passed, the parties cannot initiate a fresh lis on the same cause of action which was subject matter of the award and that the award will have to be enforced or challenged in accordance with the procedure prescribed under the Arbitration Act,1940.

18) It needs to be examined as to whether ratio of the aforesaid judgments can be applied to a suit for partition.

19) The legal position that a suit for partition gives rise to a recurring cause of action till the property is actually partitioned is no longer *res integra*. The said legal position is settled by a catena of decisions of various High Courts, including this Court as also the Hon'ble Supreme Court of India. Reference in this regard, can be made to judgment of this Court in the case of ***Laxmanrao Mahadeo Nikose Vs. Narayan Mahadeo Nikose***, reported in ***2014 (5) MhLJ 772***. The contention of the learned advocate for the appellant

needs to be accepted that cause of action with respect to partition and separate possession is recurring in nature.

**20)** The issue to be considered is as to what is the effect of dismissal of the earlier suit filed by the arbitrator for making the award relating to partition of suit property rule of the Court. Under the Arbitration Act, 1940, an award passed by an arbitrator is not enforceable/executable unless it was made rule of the Court. The award for partition between the parties, therefore, cannot be termed to be a decree for partition.

**21)** At the same time, it must be borne in mind that an arbitral award under the old Act, although not made rule of the Court, cannot be ignored in its entirety.

**22)** The judgments relied upon by the learned advocate for the respondents/defendants will show that the Courts have consistently held that once the parties had invoked arbitration with relation to a particular cause of action, it is not open to agitate the said issue again on the ground that the award passed was not made rule of the Court. Although the said legal principle is well entrenched, as is apparent

from the aforesaid judgments, on which reliance is placed by the respondents/defendants, it must also be stated that the principle applies only when fresh arbitration is initiated or suit is filed is on the same cause of action, after an award is passed on the very cause of action. The principle in the said decisions will not apply to a case of partition and separate possession which, as stated above, gives rise to a cause of action of recurring nature. It will be profitable to refer to Full Bench decision of the Allahabad High Court in the case of *Bisheshar Das and Anr. Vs. Ram Prasad and Anr*, reported in *(1891) ILR 13 Allahabad 309*, wherein it is held that where a decree declaring a right to partition which is not given effect to, or if execution of the decree is barred by lapse of time, or the decree becomes enforceable otherwise, it is open for the parties to bring a fresh suit for partition. Relevant observations of the Full Bench decision are extracted herein-below:-

*“The principle laid down in the case of Nasratullah v. Mujibullah and others appears to us to govern this case. In that case it was held that where a decree declaring a right to partition has not been given effect to by the parties and the decree has*

*become by lapse of time or otherwise unenforceable, it is competent to the parties, or any of them, if they continue still to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. In the course of their judgment the learned Chief Justice, Sir John Edge, and one of us stated as follows :- "It has not been given effect to by the parties proceeding to partition in accordance with it, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when by reason of limitation or otherwise they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suit. So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition and desiring to partition, has his right challenged, it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable." As it appears to us, the right to enforce partition is a legal incident of a joint tenancy, and so long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. For these reasons the Courts below have erred in dismissing the suit..."*

*In Madan Mohan Mondul and ors...vs..Baikanta Nath Mondul and anr.; Vol. X The Calcutta Weekly Notes 839, the Calcutta High Court held thus: "Moreover, as pointed out in the case of Nasrat ullah v. Mujibullah (1) "When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint*

*property, to bring another suit for a declaration of a right to partition in case their right to partition is called in question at a time when by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits. So long as the property is jointly held, so long does a right to partition continue”*

**23)** In the present case, the arbitration proceeding was dismissed on account of failure on the part of the plaintiff to pay appropriate stamp duty on the award. The application under Section 20 for making the award rule of the Court was not decided on merits. Since the right to seek partition is a recurring right, in the considered opinion of this Court, fresh suit for partition and separate possession will be maintainable.

**24)** In this regard, it will also be appropriate to refer to certain developments that had taken place after dismissal of Civil Suit No.8 of 1964.

**25)** One M/s. Ram Bahadur Thakur had instituted a suit for recovery of money against the defendant (Mohanlal), being Special Civil Suit No.54 of 1963. Decree for recovery of money was passed against defendant (Mohanlal). An

execution proceeding being Special Darkhast No.69 of 1966 was filed for execution of the decree. The plaintiff raised an objection in the said execution proceeding claiming half share in the suit property when the suit property was sought to be attached. The defendant had also raised an objection in the said proceeding vide exhibit 116 stating that the plaintiff had half share in the suit property. The objections were decided by the learned executing Court vide order dated 18.11.1968. Likewise, in Revenue Case No.864/A-59(13)/64-65, decided by the Tahsildar on 18.12.1968, the defendant admitted the partition recorded in the document dated 02.10.1961, thereby acknowledging share of plaintiff in the suit property. Thus, the right of plaintiff is specifically admitted by defendant even after dismissal of Civil Suit No.8 of 1964, and as such there is a subsequent cause of action for filing the suit for partition as a consequence of which even on facts dismissal of earlier suit filed to make the arbitral award rule of the Court will not bar subsequent suit for partition.

**26)** The first substantial question of law is accordingly answered in favour of appellants and against

respondents/defendants.

**AS TO SUBSTANTIAL QUESTION OF LAW NO. 2**

27) The learned advocate for the respondents/defendants contends that since the plaintiff was ousted from the suit property in the year 1960 itself, suit filed in the year 1973 was barred by limitation. The learned Trial Court has rejected the contention that suit was barred by limitation in view of admission of title of plaintiff by the defendant in execution proceedings filed by M/s. Ramprasad Thakur as also in the proceeding before the Tahsildar for mutation of agricultural lands.

28) The learned First Appellate Court has, however, recorded that possession of the defendant had become adverse in the year 1960 itself when he had claimed exclusive title over the suit property to the exclusion of the plaintiff and thereby asserting possession adverse and hostile to the interest of plaintiff. It is held that the suit is filed in the year 1973 after a period of 12 years and is accordingly barred by limitation.

**29)** In the considered opinion of this Court, the learned Trial Court has rightly decided the issue of limitation. Assuming that the defendant ousted the plaintiff in the year 1960 and claimed exclusive ownership, the record clearly indicates admission of right of plaintiff in the suit property by the defendant till the year 1968. The suit filed in the year 1973 or even 1976 after return of plaint is therefore filed within a period of 12 years from the date of admission of right of plaintiff in the suit property by the defendant. The suit is therefore filed within limitation. The findings by the learned First Appellate Court will on the aspect of limitation are clearly unsustainable and are arrived at without taking into consideration material facts relating to admission of title of plaintiff by the defendant on record. The second substantial question of law is therefore required to be answered in favour of the appellants and against respondents/defendants.

**30)** In the result, the Second Appeal deserves to be allowed by confirming the judgment and decree passed by the learned Trial Court and setting aside the judgment and

decree passed by the learned First Appellate Court.

**31)** It will, however, be pertinent to state that while the suit was pending, the original plaintiff had expired. The plaintiff is survived by nine legal representatives, who were brought on record. Legal representatives of plaintiff No.1(C) have filed the present Second Appeal. The other eight legal representatives have not challenged the decree passed by the learned First Appellate Court.

**32)** It is the case of respondents/defendants that all the other legal representatives have already sold their respective shares in the suit property to the respondents/defendants. It is further contended that appellant No.4 (Nilesh) and respondent No.15 (Nivedita) have already sold their share in the suit property to the defendants. The learned executing Court shall take into consideration the transfers effected by legal representatives of plaintiffs in favour of defendant or legal representatives of defendants while working out the shares.

**33)** Second Appeal is, therefore, partly **allowed** in the following terms:-

I. Judgment and decree dated 25.04.2006, passed by the learned 7<sup>th</sup> Ad-hoc Additional District Judge, Nagpur in Regular Civil Appeal No.344 of 1998 is quashed and set aside.

II. Judgment and decree dated 12.02.1998, passed by the learned 4<sup>th</sup> Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.204 of 1976 is confirmed.

(ROHIT W. JOSHI, J.)

*Tanmay..*