

(2014) 12 BOM CK 0119

In the Bombay High Court

Case No : Second Appeal No. 364 of 1992 and Cross-Objections (ST). No. 18331 of 1992

Bhilaji Bandu Sutar and Lohar

APPELLANT

Vs

Rangarao Shankar Sutar

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 41 Rule 22
Evidence Act, 1872 — Section 35
Hindu Succession Act, 1956 — Section 17, 22
Penal Code, 1860 (IPC) — Section 494

Citation : (2015) 1 ABR 768 : (2015) 2 ALLMR 354 : (2015) 2 MhLj 410

Hon'ble Judges : K.K. Tated, J

Bench : Single Bench

Advocate : V.S. Gokhale, Advocate for the Appellant; Rahul P. Walwekar, Advocate for the Respondent

Judgement

K.K. Tated, J.

1. Heard the learned counsel for the parties.

2. For the sake of convenience, the nomenclature of the parties as is stated in the suit will be referred to hereinafter as the appellant / original defendant no. 2 and respondent nos. 1, 2, 3 and 4 / original plaintiff nos. 1, 2, 3, 4 and respondent no. 5 / original defendant no. 1 and respondent no. 6 / original defendant no. 3.

3. Being aggrieved by the judgment and decree dated 17.3.1992 passed by IVth Additional District Judge, Kolhapur in Regular Civil Appeal No. 230 of 1986 and cross objections, the defendant no. 2 preferred the present Second Appeal. Respondent No. 1 original plaintiff filed Cross-Objection.

A few facts of the matter are as under:

4. The original plaintiffs filed Regular Civil Suit No. 55 of 1997 in the court of Civil

Judge, Junior Division at Malkapur for declaration that defendant no. 1, Muktabai Shankar Sutar was not legally wedded wife of Shankar Kondi Sutar. The property was sold by defendant no. 1 in favour of defendant no. 2. The sale deed executed by defendant no. 1 in favour of defendant no. 2 in respect of the suit property bearing G.P. No. 25 is bad in law and same be set aside. In the alternative, it is to be declared that the suit property bearing G.P. No. 25 was HUF property and therefore defendant no. 1 has no right to sell the entire property in favour of defendant no. 2. The plaintiff pleaded that plaintiff no. 1 is the son of Shankar Kondi Sutar and plaintiff nos. 2, 3 and 4 are daughters. Their contention was that the defendant no. 1 was kept mistress of their father Shankar Kondi Sutar. On the basis of the pleadings, the trial court by its judgment and decree dt. 20.3.1986 held that plaintiffs are entitled to recover possession of the house property in suit to the extent of their 3/5th share by metes and bounds. The partition of the suit house property be effected by appointment of Court Commissioner. The trial court further held that mesne profit will be determined separately in view of Order 20 Rule 12 of the Code of Civil Procedure.

5. Being aggrieved by the said judgment and decree passed by the trial court, defendant nos. 2 and 3 preferred Regular Civil Appeal No. 230 of 1986 in the court of IVth Additional District Judge, Kolhapur at Kolhapur. In that appeal, the plaintiffs preferred cross-examination under Rule 22 of Order XLI of the Code of Civil Procedure. They raised following grounds in their cross-objection:

- "a) The lower court erred in not granting the whole relief as prayed in the suit.
- b) The lower courts refusal to grant whole relief is illegal and illogical.
- c) The reasoning for rejecting relief to the extent of share in the suit property is illegal and unwarranted.
- d)The respondents are entitled to whole relief but this aspect has not been properly followed and appreciated.
- e) The lower court has not followed the relevant provisions of Hindu Law and Hindu Succession Act."

6. The appellate court by judgment and decree dt. 17.3.1992 dismissed the appeal preferred by defendant nos. 2 and 3 and allowed the cross-objections. The appellate court directed defendant nos. 2 and 3 to deliver possession of the suit property to the plaintiff.

7. Being aggrieved by the judgment and decree passed by the lower appellate court in Regular Civil Appeal No. 230 of 1996, the original defendant no. 2 preferred the present Second Appeal.

8. The Second Appeal is admitted by this court on 4.8.1992 on following substantial questions of law:

"1) Whether the presumption regarding the marital status of Muktabai (Original

Defendant No. 1 since deceased) on the basis of her long cohabitation with Shankar and the documentary evidence regarding the voters' list and property card could be said to be rebutted by the oral evidence of the plaintiffs.

2) Whether the lower Appellate court erred in law in relying purely on oral evidence while disturbing the finding of the marital status of Muktabai since deceased?

3) Whether the lower Appellate court committed a grave error of law in recording a finding on the point which was not even raised in the cross-objections and which was not seriously contested before the Court?"

9. The learned counsel for defendant nos. 2 submits that this court has framed three substantial questions of law at the time of admission of the Second Appeal. He submits that only one question of law involved in the present Second Appeal is "whether the defendant no. 1 was wife of Shankar Kondi Sutar and whether she had right to sell the suit property?" By consent of both the parties, the above mentioned question is treated as substantial question of law in the present Second Appeal.

10. The learned counsel for the Appellant / defendant no. 2 submits that the appellate court erred in coming to the conclusion that defendant no. 1 was not the wife of deceased Shankar Kondi Sutar but she was his kept mistress. He submits that the appellate court erred in coming to the conclusion that the defendant no. 1 failed to produce on record any document to show that she married with deceased Shankar Kondi Sutar. He submits that the lower appellate court erred in coming to the conclusion that defendant no. 1 failed to state the specific date, specific time, place and the presence of persons before whom the marriage of defendant no. 1 took place with deceased Shankar Kondi Sutar. He submits that the appellate court erred in coming to the conclusion that if the marriage between defendant no. 1 and deceased Shankar Kondi Sutar had been legally solemnised by performing all the necessary ceremonies for it in any form, then the defendant would have certainly adduced evidence of some of the relatives, who were present at the alleged marriage to prove the same. He submits that even the appellate court erred in coming to the conclusion that merely living of the defendant no. 1 with deceased Shankar Kondi Sutar from the year 1954-55 till the death in 1977 and looking after the household duties do not give the status of legally wedded wife to the defendant no. 1, unless and until legal marriage is solemnised between defendant no. 1 and deceased Shankar Kondi Sutar. He submits that the appellate court erred in coming to the conclusion that, had the defendant no. 1 lived with deceased Shankar Kondi Sutar for his whole life from 1954-55 without solemnising the marriage with him, then this living will give her only the status of mistress of deceased Shankar Sutar and not the status of legally wedded wife of deceased Shankar Sutar.

11. The learned counsel for the defendant no. 2 submits that the Appellate Court failed to consider Exh.56 i.e. Ration Card of deceased Shankar Kondi Sutar. He

submits that the said Ration Card bearing No. L-667178 was issued by the Tahsildar Shahuwadi on 17.12.1976 in which only two names are shown (1) Shankar Kondi Sutar, head of family and defendant no. 1 Muktabai Shankar wife. He submits that the said Ration Card was issued by the authority at the instance of the deceased Shankar Kondi Sutar. In the ration card defendant no. 1 is described as wife of deceased Shankar Kondi Sutar. He further submits that even the voters' list shows the name of defendant no. 1 as wife of deceased Shankar Kondi Sutar. He submits that these two relevant documents were not properly considered by the appellate court. He submits that the appellate court erred in coming to the conclusion that these two documents do not support the case of the defendant no. 1 that she was the wedded wife of deceased Shankar Kondi Sutar. He further submits that a woman and man living together as wife and husband for a very long time gives rise to a presumption that they are wedded wife and husband and a very heavy burden lies on the other who seeks to rebut the presumption. In support of this contention the learned counsel for the defendant no. 2 relies on the judgment in the matter of Badri Prasad Vs. Dy. Director of Consolidation and Others, In this case, The Apex Court in a short order declared the law thus:

"For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. An adventurist challenge to the factum of marriage between the two, by the petitioner in this special leave petition, has been negatived by the High Court. A strong presumption arises in favour of wed-lock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses, deserves no consideration. If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married, few will succeed. The contention deserves to be negatived and we do so without hesitation. The special leave petitions are dismissed."

12. The learned counsel for the defendant no. 2 relies on the Apex Court judgment in the matter of Sumitra Devi Vs. Bhikan Choudhary, In this case, the Apex Court laid down the law in paragraph 3 of report thus:-

"3. We are impressed by the fact that the respondent had not seriously disputed the fact of marriage and had taken the stand that such marriage was void being vitiated by fraud and suppression of material facts as also for non-performance of religious rites. The Additional Sessions Judge and the High Court have adopted a technical approach while considering the question of marriage. There is no doubt that in order that there may be a valid marriage according to Hindu Law, certain religious rites have to be performed. Invoking the fire and performing

Saptapadi around the sacred fire have been considered by this Court to be two of the basic requirements for a traditional marriage. It is equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriages of this type give rise to legal relationship which law accepts. The Additional Sessions Judge as also the learned single Judge of the High Court did not refer to the fact that for about a decade the parties had lived together. Public records including voters' lists described them as husband and wife and competent witnesses of the village of the wife as also the husband had supported the factum of marriage. Witnesses have also spoken about the reputation of the appellant being known in the locality as the wife of the respondent. These facts should not have been totally overlooked while considering the case of marriage. It is possible that on account of the lawyer's mistake the appellant's witnesses have not referred to the religious rites which might have been performed at the time of marriage. It is equally possible that the learned Magistrate while recording the evidence has not specifically recorded the details and has only indicated that witnesses have spoken to the fact of marriage. Since the form of marriage has not been found and traditional marriage according to Hindu Law requires performance of certain religious rites, we consider it proper in the peculiar facts of the case to remit the matter to the learned Magistrate for a fresh inquiry at which apart from the evidence already on record both sides should be entitled to lead further evidence particularly in support of their respective stands relating to the factum of marriage."

In the present case, Shankar Kondi Sutar and Mutkabai lived together as husband and wife for more than two decades. The name of Muktabai was entered into voter's list as wife of Shankar Kondi Sutar residing at the suit house number 25 at Bambawade. Muktabai's name as wife of Shankar Kondi Sutar was entered into Ration Card. This must have been to the knowledge of late Shankar Sutar. After the death of Shankar Sutar in the year 1977, the Gram Panchayat Bambawade entered the name of Muktabai wife of deceased Shankar Kondi Sutar as owner of the house. These entries in the public document did support of the case of the defendant that Muktabai is the wedded wife of deceased Shankar Kondi Sutar. As against this, there is oral evidence of P.W. No. 1, Rangarao Shankar Sutar (Plaintiff No. 1). His interested oral evidence does not rebut the legal presumption that Muktabai and Shankar Kondi Sutar being wedded wife and husband which arise on account of their living as husband and wife for more than two decades supported by public documents viz. voters' list, ration card, Gram Panchayat property card.

13. The learned counsel for defendant no. 2 also relies on the judgment of the Apex Court in the matter of Jagpati Vs. State of Madhya Pradesh, . The Apex Court held that if a man and woman live together for long years as husband and wife, then a presumption arises in law of legality of marriage existing between the two. Paragraph 4 of that judgment reads thus:

"4.What has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable (see Thakur Gokalchand Vs. Parvin Kumari, . It has been found by all the Courts including the High Court that Chinathambi and Pavayee No. 2 lived together since long. But the High Court held that the presumption stood rebutted for reasons stated earlier. The question is if any of the circumstances taken individually or together were sufficient to warrant the finding that the presumption stood rebutted. Taking each one of them it may be stated that the omission to mention the name of a woman who was living as a concubine and her offspring in the will executed by the father-in-law could not destroy the presumption which otherwise arose in law. In the Hindu society no father would, normally, tolerate behavior of his son of having a concubine, therefore, the mere fact that Manthi while executing the will did not mention the name of Pavayee No. 2 or her offspring was of no consequence. Similarly the absence of any reference to Pavayee and her children in the compromise entered between Chinathambi and his brothers was totally irrelevant circumstance. The suit was filed for partition by one of the members of joint Hindu family for his share on strength of will executed by his father. Since his children were not given any share by his father they could not have been party either in the suit or in the compromise decree. The absence of their names therefore could not be taken adversely for destroying the presumption. As regards evidence of P. W. 6 or D.W. 4 their depositions are on record. It does not indicate that they stated Chinathambi and Pavayee did not live together. Since it was not disputed that Ramaswamy was born of Chinathambi and Pavayee who lived together as husband and wife since 1920 each of these circumstances was irrelevant and could not have resulted in rebutting the presumption. In our opinion the High Court was not justified in interfering with the findings of fact recorded by the First Appellate Court arrived at after appreciating the evidence on record."

14. On the basis of these submissions, the learned counsel for the defendant no. 2 submits that the impugned judgment and decree passed by lower appellate court dated 17.3.1992 in Regular Civil Appeal No. 230 of 1986 and Cross Objections requires to be set aside.

15. On the other hand the learned counsel for the plaintiffs vehemently opposed the present Second Appeal. He submits that though defendant no. 1 filed her written statement no where she has stated the date of marriage, the persons who were present at the time of marriage and where the marriage took place. He submits that even the defendant no. 1 failed and neglected to produce any documentary evidence about the marriage. He submits that the appellate court in paragraph 11 rightly held that mere staying of defendant no. 1 with deceased Shankar Kondi Sutar from the year 1954-55 till his death on 8.6.1977 and looking after the household duties of his house do not give her the status of legally wedded wife of Shankar Kondi Sutar unless and until legal marriage is solemnised between them. He submits that Shankar Kondi Sutar died on

3.6.1977 and immediately defendant no. 1 sold the property on 16.7.1977 to the defendant no. 2. This itself shows the way in which the defendant no. 1 disposed of the deceased Shankar's property without any authority. He submits that the Apex Court in the matter of Easwari Vs. Parvathi, held that the bare fact of a man and woman living as husband and wife do not normally give them the status of husband and wife. He mainly relies on the paragraph 6, 7, 8 and 9 of that judgment.

"6. The High Court dealt with the matter at length. It is stated by the Appellant herein before the Trial Court that Muniammal died ten years ago i.e. in 1976. It is further stated that on December 15, 1977 Ponnangatti married to the first Defendant, the Appellant herein in the Devasthanam of Sri Perianayaki Saneda Kanagagiri Eswarar at Devikapuram. To prove the factum of marriage, she produced a temple receipt before the High Court being Ex. B-8 which was produced from the lawful custody of the trustee of the temple. Exs. B-9 and B-10 were also produced and said to be the accounts for the gifts made at the time of the said marriage. The first Defendant/Respondent also produced Exs. B-1 and B-2 which are the voters list of 1978 and 1983 wherein it appears that the first Defendant was described as the wife of Mannangatti and Ponnangatti. The pass books of the bank accounts for the year 1984 and 1985 being Exs. B-3 and B-4 and bankers' reply were also produced to show that the first Defendant was described as wife of the deceased Ponnangatti Gounder. The High Court duly assessed all documents and held that no reliance can be placed on the Exh. B-3 to B-6 as they only represent the unilateral description of the first Defendant as wife of Ponnangatti Gounder. Similarly, Ex. B-7 was a mortgage deed executed just prior to the filing of the suit where also the unilateral description of the first Defendant as wife of Ponnangatti Gounder can be seen. Similarly, Exs. B-9 and B-10 also cannot be relied upon because it is not very difficult to prepare these documents for the said purpose. Hence the High Court did not place reliance on such exhibits.

7. Accordingly, the High Court was left only with the documentary evidence of Ex. B-8 on the one hand and Exs. B-1 and B-2 on the other hand. Ex. B-8 was produced from the lawful custody of trustee of the temple and the said trustee while examining, deposed before the Court in his cross-examination that he did not know about the actual marriage said to have been conducted in the temple. In these circumstances, the probative value of Ex. B-8, as correctly appreciated and held by the High Court, gets diluted. Other Exhibits being Exs. B-1 and B-2 were also specifically dealt with by the High Court and the High Court after assessing the document held that different descriptions of the name of husband of the first Respondent are given in the voters list. Therefore, the High Court did not place any reliance on the said voters list.

8. The High Court also placed reliance on Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, and found that mere going through certain ceremonies with intention of marriage will not make the

ceremonies as prescribed by law or approved by any established custom. The bare fact of a man and a woman living as husband and wife does not normally give them the status of husband and wife."

16. The learned counsel for the plaintiffs also relies on the judgment of the Apex Court in the matter of Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, In this authority the Apex court observed that the word solemnised means, in connection with the marriage, to celebrate the marriage with proper ceremonies and in due form according to Shorter Oxford Dictionary. He relies on paragraph 5, 6, 7 and 8 of the judgment.

"5.The word "solemnize" means, in connection with a marriage, "to celebrate the marriage with proper ceremonies and in due form", according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is "celebrated or performed with proper ceremonies and due form" it cannot be said to be "solemnized". It is therefore essential, for the purpose of section 17 of the Act, that the marriage to which section 494 I.P.C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom.

6. We are of opinion that unless the marriage which took place between appellant no. 1 and Kamlabai in February 1962 was performed in accordance with the requirements of the law applicable to a marriage between the parties, the marriage cannot be said to have been "solemnized" and therefore appellant no. 1 cannot be held to have committed the offence under section 494 I.P .C.

7. We may now determine what the essential ceremonies for a valid marriage between the parties are. It is alleged for the respondent that the marriage between appellant no. 1 and Kamlabai was in "gandharva" form, as modified by the custom prevailing among the Maharashtrians. It is noted in Mulla's Hindu Law, 12th Edition, at p. 605 : "The Gandharva marriage is the voluntary union of a youth and a damsel which springs from desire and sensual inclination. It has at times been erroneously described as an euphemism for concubinage. This view is based on a total misconception of the leading texts of the Smritis. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste."

8. At p. 615 is stated :

"(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely - (1) invocation before the sacred fire, and (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the scared fire.

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong."

17. The learned counsel for the plaintiffs in support of the Cross Objection submits that the lower Appellate Court committed substantial error of law in holding that the plaintiffs are not entitled to the right of pre-emption under section 22 of the Hindu Succession Act, 1956 in respect of the suit property. He submits that bare reading of section 22 states that class I heir can claim pre-emption right in respect of HUF property at the time of partition. Hence, judgment and decree passed by the lower appellate court rejecting plaintiffs' prayer for pre-emption right under section 22 of the Hindu Succession Act is required to be set aside and hold that the plaintiff has a preferential right to acquire the suit property.

18. On the basis of these submissions, the learned counsel for the plaintiffs submits that the view taken by the Appellate Court is according to law. He further submits that the appellant has not shown any substantial question of law involved in the present Second Appeal. Hence, Second Appeal deserves to be dismissed with costs.

19. I have heard both the sides at length. I have gone through the copy of plaint, written statement, deposition of parties and documentary evidence produced on record. The following facts are no longer in dispute.

20. Plaintiff no. 1 is a son and the Plaintiff nos. 2, 3 and 4 are the daughters of the deceased Shankar Kondi Sutar. The deceased Shankar Kondi Sutar with his wife Akkatai resided at Boriwade. The plaintiff no. 1, son and the daughters plaintiff nos. 2 and 3 were born to Akkatai while she along with her husband Shankar Kondi Sutar resided at Boriwade. After all the daughters were married Akkatai died and Shankar Kondi Sutar shifted from Boriwade to Bambawade Taluka Shahuwadi Dist. Kolhapur. Plaintiff no. 1 Rangarao Shankar Sutar P.W.No. 1 and defendant no. 1 Muktabai Shankar Sutar are about the same age 58 years. Defendant no. 1 Muktabai Shankar Sutar was staying with Shankar Kondi Sutar from about 1954-55 as his wife till his death on 3.6.1977.

21. The dispute is whether Muktabai Shankar Sutar was the wedded wife of Shankar Kondi Sutar or she was the kept mistress of deceased Shankar Kondi Sutar. According to the plaintiff, she was kept mistress of Shankar Kondi Sutar and according to the defendants she was wedded second wife of deceased Shankar Kondi Sutar after the death of first wife Akkatai. When Shankar Kondi Sutar resided at Bambawade she was residing with Shankar Kondi Sutar from about 1954-55 till his death on 3.6.1977. Her name was entered in the Ration Card and Voters List as wife of Shankar Kondi Sutar. Shankar Kondi Sutar had purchased open plot at Bambawade and built two houses bearing Grampanchayat House No. 25 and 26. House no. 25 is the house in dispute. In the house 26 plaintiff No. 1 resided separately from his father. Now the first

question to be decided is whether the defendant no. 1 is the wedded second wife of deceased Shankar Kondi Sutar or she is the kept mistress of Shankar Kondi Sutar. There is no oral evidence on this point except that of plaintiff no. 1. Plaintiff no. 1 as P.W. No. 1 denies that the defendant no. 1 is legally wedded wife. Plaintiff no. 1 is interested in denying her status as legally wedded wife. The voters list of Bambawade, the Ration Card of Shankar Kondi Sutar at Bambawade are pressed as the most reliable evidence as in both of them she has been described as the wife of Shankar Kondi Sutar. After the death of Shakar Kondi Sutar the name of defendant no. 1 is entered in the G.P . of Bambawade as owner of the suit house being wife of Shankar Kondi Sutar. The voters" list and Ration Card were prepared during the life time of Shankar Kondi Sutar and to his knowledge the defendant no. 1 has been shown as wife and the entry in the GP Bambawade of the Suit House as house of defendant no. 1. The above public documents fully support the case of defendant no. 1 that she is the wedded wife of Shankar Kondi Sutar. It is to be noted that the electoral roll is a public document and is prepared by a public servant in discharge of his public duty and the same is relevant under section 35 of the Evidence Act.

22. The Apex Court in the matter of Badri Prasad v. Dy. Director of consolidation and Others (Supra) held that for a man and woman living together for 50 years held a strong presumption of marriage between them. It is not necessary for them to bring forward witnesses to ceremonies of their marriage. The Apex Court in the matter of Sumitra Devi v. Bhikan Choudhary (Supra) held that it is equally true that there can be marriage acceptable in law according to customs which do not insist on performance of such rites. Similar view is taken by the Apex Court in the matter of S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and Others (Supra).

23. The authority relied by the advocate for the respondents in the matter of Easwari v. Parvathi & Ors. (Supra) is not applicable in the facts and circumstances of the present case. In that case, the Apex Court held that the bare fact of man and woman living as husband and wife does not normally give them the status of husband and wife. In the case in hand, the defendant placed on record Ration Card which shows the name of deceased Shankar Kondi Sutar as husband and defendant no. 1's name as wife. In similar way the voter list also shows the name of defendant no. 1 as wife of deceased Shankar Kondi Sutar. Therefore the authority in the matter of Easwari v. Parvathi & Ors. is not applicable in the present case. In similar way the Apex Court in the matter of Bhaurao Shankar Lokhande vs. State of Maharashtra (Supra) is also not applicable in the case in hand. The defendants relied on ration card and voters list where the name of defendant no. 1 is shown as wife of deceased.

24. The trial court as well as Appellate court passed order for determining mesne profit under Order 20 Rule 12 of the Code of Civil Procedure. The plaintiffs are entitled to the same.

25. The plaintiffs filed cross objection in the present Second Appeal claiming pre-

emption right under section 22 of the Hindu Succession Act in respect of the suit property. Section 22 of the Hindu Succession Act, 1956 reads thus:

"22. Preferential right to acquire property in certain cases.

(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation. In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

Provision of the section declares that where an interest in the immovable property of an intestate devolve upon two or more heirs specified in class I of the schedule then it is between class 1 heirs, inter alia they have right of pre-emption.

26. In the present case, it is the case of the plaintiff that the suit property was sold by defendant no. 1 in favour of defendant no. 2 which is not class I heir. Therefore the appellate court rightly decided point no. 7 holding that plaintiffs are not entitled to the right under section 22 of the Hindu Succession Act. I do not find any error in the said finding.

27. Hence, the question of law framed hereinabove is answered in favour of the appellant holding that defendant no. 1 is the wedded wife of deceased Shankar Kondi Sutar. Therefore, I agree with the finding of trial court that the defendant no. 1 Muktabai Shankar Sutar is legally wedded second wife of the deceased Shankar Kondi Sutar. Hence, the following order:

(a) Judgment and decree passed by IVth Additional District Judge, Kolhapur in Regular Civil Appeal No. 230 of 1956 and counter claim is set aside.

(b) Judgment and decree passed by Civil Judge, Junior Division, Malkapur dt. 20.03.1986 in Regular Civil Suit No. 55 of 1997 is restored.

(c) Cross-objections St.No. 18331 of 1992 is rejected.

(d) No order as to costs.