

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 11655 OF 2018

1. Raghunath S/o Gyanoba Kadam
Died through LR's

1/1. Seemabai @ Simintabai Raghunath Kadam
Age: 76 years, Occu: H.H.

1/2. Sanjiv Raghunath Kadam
Age: 53 years, Occu: Agril.,

1/3. Balikabai Yadav Yewate
Age: 51 years, Occu: H.H.

1/4. Lalita Madhukar Barmale
Age: 56 years, Occu: H.H.

2. Sou. Seemabai S/o Raghunath Kadam,
Age: 76 years, Occu: H.H.,
All R/o: Kasar Shirsi,
Taluka: Nilanga, District Latur.

...Petitioners
(Plaintiffs)

Versus

1. Ashok S/o Vishambhar Trimukhe,
Age: 46 years, Occu: Business

2. Suresh S/o Vishambhar Trimukhe,
Age: 42 years, Occu: Business,
All R/o: Harikjawalga,
Taluka: Nilanga, District Latur.

3. District Superintendent of Land Records
Latur.

... Respondents

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Mrs. Madhaveshwari S. Mhase i/b Lex Aquila, Advocate for the Petitioners
Mr. S. S. Thombre, Advocate for Respondent Nos.1 & 2
Mr. A. A. Jagatkar, AGP for Respondent No.3

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CORAM : **NITIN B. SURYAWANSHI, J.**
RESERVED ON : **9th December, 2021**
PRONOUNCED ON : **23rd December, 2021**

JUDGMENT :

. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This petition is directed against the order passed by the learned Civil Judge, Senior Division, Nilanga, below Exhibit-117 in Special Civil Suit No.77/2012, thereby rejecting the said application filed by the petitioners/original plaintiffs to direct the District Superintendent of Land Records, Latur (concerned authority) to give a specific finding and decision in compliance of the order passed by this Court in Writ Petition No.2743/2015.

3. The petitioners/original plaintiffs filed Regular Civil Suit No.77/2012 for a declaration that the sale deed executed by respondent/defendant Nos.1 & 2 on 11-05-2009 vide day book No.1674/2009 be declared as null and void and not binding on the plaintiffs. A decree of possession of land survey No.20/C admeasuring

00 H. 01 R., situated at village Kasar Shirsi, Taluka Nilanga (for short “suit property”) was also sought. In the said suit, trial court framed issues. Issue No.2 is ‘whether plaintiffs proved that, sale deed dated 11-05-2009 is hit by the provisions of the Bombay Provisions of Fragmentation and Consolidation and Holdings Act, 1947’ (for short “the said Act”). By filing application (Exhibit-86), the plaintiffs prayed for referring issue No.2 to the competent authority. The said application was rejected by the trial court. The rejection order was challenged by the plaintiffs in Writ Petition No.2743/2015, which was allowed. Accordingly, the trial court referred issue No.2 to respondent No.3/District Superintendent of Land Records, Latur for giving finding on it.

The respondent No.3 submitted a report dated 06-06-2017 to the trial court stating that the consolidation scheme in terms of the said Act is not made applicable to the village Kasar Shirsi, Taluka Nilanga, District Latur. It is further stated that survey No.20 (suit property) is included in the notification issued by the Collector, Latur under Section 122 of the Maharashtra Land Revenue Code, 1966 (for short “the MLR Code”) in the city survey scheme. After receipt of the said report, an application (Exhibit-117) was filed

by the petitioners praying for calling a detailed report from respondent No.3 on the ground that, without holding an inquiry as required by law and without a specific finding and decision in compliance of the order of the High Court, respondent No.3 has sent the said report. The plaintiffs challenged the said decision by filing an appeal bearing appeal No.614/2018 before the Superintendent of Land Records, Aurangabad which was disposed of on the ground that no order is passed by the respondent No.3. Therefore, he may be directed to give a specific finding and decision after holding an inquiry. The said application was resisted by the defendants. The trial court rejected the application. Hence, the present petition.

4. Heard the learned advocate for the petitioners and learned advocate for the respondents.

5. The learned advocate for the petitioners assailed the impugned order contending that respondent No.3 has submitted the said report which was contrary to the record. He has not given an opportunity of hearing to the plaintiffs. By pointing out the notice (Exhibit-P-V), she submitted that the notice issued under Section 37(2) of the MLR Code was in respect of the house property and it was not pertaining to consolidation scheme. She further submitted

that respondent No.3 ought to have decided the issue by giving an opportunity of hearing to the parties. By relying on the provisions of Sections 33B and 33C of the said Act, she submitted that the Consolidation Officer has power to summon to any person to give evidence or to produce documents. She also relied on the definition of fragmentation given under Section 2(4) and Section 8 which prohibits fragmentation. By pointing out the affidavit-in-reply filed by respondent No.3, she submitted that inconsistent statements are made in the affidavit-in-reply. Hence, it is necessary to remand the matter to respondent No.3 for inquiry. While relying upon the notification issued by the Collector under Section 122 of the MLR Code, she pointed out that only 50.00 square meter portion of the suit land is notified and included in the city survey record, whereas respondent No.3 has stated in his report that, the entire survey No.20 (suit property) is included in city survey scheme. She further submitted that the said report was questioned before the respondent No.3 by filing application dated 21-12-2017, however, it was turned down on the ground that no order is passed by respondent No.3. The trial court has ignored these aspects while passing the impugned order. The trial court has erroneously proceeded to hold that the finding of respondent No.3 can be challenged before the proper

authority given under the MLR Code. She therefore submitted that the impugned order is unsustainable and the same be set aside by allowing the petition and the application (Exhibit-117) filed by the petitioners may be allowed.

6. On the other hand, learned advocate for respondents submitted that respondent/defendant No.1 by a sale deed dated 11-05-2009 purchased 1.R plot from survey No.20 (suit property). The pleadings in the suit show that the suit property is a commercial property and the suit is filed belatedly. The plot not being agricultural land and since is a commercial land, there is no question of application of consolidation and fragmentation scheme. He supported the report of respondent No.3 by submitting that respondent No.3 has answered the issue referred to him by saying that the said Act is not made applicable to the suit land, as no scheme of consolidation was implemented in the village Kasar Shirsi, Taluka Nilanga, District Latur. Hence, according to him, there was no question of giving hearing to the plaintiffs. By relying upon the notice (Exhibit-P-V), he submitted that the house property in dispute is already entered into city survey record, hence, there is no question of application of the said Act. He further pointed out the receipts of tax paid by the defendants.

According to him, incorrect statements are made by respondent No.3 in the affidavit-in-reply. No notification is filed on the record by him. He further submitted that since no consolidation scheme was implemented in the village Kasar Shirsi, Taluka Nilanga, District Latur, there is no question of transaction of sale being hit by consolidation scheme. He therefore prayed for dismissal of writ petition being merit-less.

7. The learned Assistant Government Pleader relied on the affidavit-in-reply filed by respondent No.3.

8. The documents placed on record in this petition show that issue No.2 was referred to the respondent No.3 for findings on it by the order 03-12-2016 passed by the trial court. The report of respondent No.3 dated 06-06-2017 states that the consolidation scheme was not made applicable to the village Kasar Shirsi, Taluka Nilanga, District Latur and the survey No.20 (suit land) is included in the city survey scheme as per notification issued by the Collector, Latur under Section 122 of the MLR Code. The said notification which is placed on record at Page-55 of the compilation shows that the city survey scheme was made applicable only for area of 50.00 square meters/1 R of survey No.20 (suit land). Respondent No.3 in his

affidavit-in-reply in Para-3 has made following averments;

“3. I say and submit that, as mentioned above, I respectfully submit that, only land to the extent of 50 Square Meters from the survey No.20 has been included in the City Survey record and rest of the land from the same survey No.20 would be governed by the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. But, it is pertinent to note that, the Consolidation scheme has not been specifically implemented in the said village, though it was made applicable by the Government Notification dated 09.03.1963. While implementing Consolidation scheme there were several complaints and owing to this the said scheme could not be implemented in the said village along with several other villages. Therefore, though the Consolidation scheme was not implemented in the said village, still the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 are applicable. Therefore, restriction as regarding transfer of land would be applicable to the said Survey No.20 of the said village also.”

9. The above averments are contrary to the report (Exhibit-114) of respondent No.3. Self contradictory statements are made by respondent No.3 in the affidavit-in-reply which are not in consonance with the report submitted by him to the trial court while giving finding on issue No.2 referred to it by the trial court. Taking into consideration the statement of respondent No.3 that restrictions regarding transfer of land would be applicable to the said Act and except 50 square meters of land of survey No.20, rest of the land

portion of survey No.20 would be governed by the consolidation scheme. The report (Exhibit-114) submitted by respondent No.3 loses its significance. The respondent No.3 has further averred that if this Court deems it appropriate to give hearing to the concerned parties, he will be duty bound to follow the same to give hearing, in my view, supports the case of the petitioner.

10. It is, therefore, clear from the record and affidavit-in-reply filed by respondent No.3 that report (Exhibit-114) is given without going through the record and without hearing the concerned parties. When the finding has to be given on issue referred by the trial court, respondent No.3 was duty bound to go through the relevant record and after hearing the concerned parties. Considering these aspects, the trial court ought to have allowed the application (Exhibit-117).

11. The trial court while passing the impugned order has ignored the fact that the respondent No.3 has given a finding on the issue referred to him by the trial court, without hearing the concerned parties and without going through the relevant record and therefore the findings are unsustainable for non following the principles of natural justice. In that view of the matter, the impugned order is

unsustainable in law and facts of the case.

12. For the aforesaid reason, the impugned order cannot sustain and the same is liable to be quashed and set aside. Hence, the following order:

ORDER

- (a) Writ Petition is allowed in terms of prayer clause “B”.
- (b) The impugned order passed by the Civil Judge, Senior Division, Nilanga below Exhibit-117 in Special Civil Suit No.77/2012, is hereby quashed and set aside.
- (c) Application (Exhibit-117) is allowed.
- (d) The respondent No.3 is directed to give findings on issue No.2 referred to it by the trial court vide order dated 03-12-2016, after going through the relevant record and after hearing the concerned parties, including the petitioners and respondents within a period of six weeks from the date of receipt of writ of this order.
- (e) Till such report is received, there shall be stay to the further proceeding of Special Civil Suit No.77/2012.
- (f) Rule is made absolute in the above terms with no order as to costs.

(NITIN B. SURYAWANSHI, J.)