

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

CIVIL APPLICATION (CAS) NO. 96 OF 2021

IN

SECOND APPEAL NO. 239 OF 2008

(Rajeshwar Natthuji Malve and another ..vs.. Haribhau Natthuji Malve and others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

None for the appellants,
Mr. Rahul Tajne, Counsel for the applicants/respondents 1 to 4 and 6,
Mrs. Shilpa Giradkar, Counsel for respondent 5.

CORAM : ROHIT B. DEO, J.

DATED : 17-02-2021

Heard.

2. This application is preferred by respondents 1 to 4 and 6 seeking recall of order dated 14-12-2020 and grant of permission to argue Civil Application 901/2019.

3. By order dated 14-12-2020, this Court dismissed Civil Application (CAO) 901/2019.

4. Civil Application (CAO) 901/2019 was preferred seeking review of order dated 11-3-2019 in Civil Application 277/2019 whereby the application preferred by respondent 5 for transposition as appellant 2 was allowed.

5. Although the learned Counsel for the applicants remained absent, this Court considered Civil Application

901/2019 on merits and observes thus :

“3. Respondent 5 was constrained to seek transposition since it was apprehended that the appellant and respondents 1 to 4 have entered into a settlement and the appeal would be withdrawn. Respondent 5 is claiming a share in the property and, therefore, she was transposed as appellant 2.

4. There is no error muchless an error apparent on the face of the record in the order dated 11-3-2019.”

6. The learned Counsel Mr. Rahul Tajne would argue that the order permitting transposition is erroneous inasmuch as there was no commonality of interest between the appellant and respondent 5. Mr. Rahul Tajne is emphasizing on the common written statement preferred in the civil suit and submits that respondent 5, who sought transposition, opposed the claim of the plaintiff that the property was purchased from the corpus of joint family and rather, she joined hands with the other respondents in contending that respondent 1-Haribhau Malwe purchased the property from self generated funds.

7. It is trite law that in a partition suit, every party is in the position of plaintiff and defendant. The concept of communality of interest *stricto sensu* would not apply to partition litigation. Be it noted, that irrespective of the common written statement, respondent 5 categorically asserted in her response to the application for disposal of

the second appeal, that she is a coparcener and there is an attempt to deprive her of rightful share. It appears from record that there was indeed an attempt to oust respondent 5 from the litigation inasmuch as there is an application moved on behalf of the appellant-Rajeshwar Malwe seeking to delete the name of respondent 5. It is not in dispute that even according to respondents 1 to 4 and 6, respondent 5 is neither a privy nor party to the alleged settlement. No reason is discernible from record why she alone is excluded.

8. Whether respondent 5 has a share in the property, is a matter to be decided finally. It would be premature to non-suit respondent 5. I do not find any error in the order which permits her transposition as the appellant.

9. Even otherwise, the order of transposition was passed in the presence of, and after hearing, the parties. The review application came to be dismissed on merits since the learned Counsel did not appear. Assuming that there is an error, the remedy is to challenge the order. The error which is alleged, is not an error apparent on the face of the record since the contentions which are raised now could have been raised when the matter was heard at the first instance.

10. While I have heard Mr. Rahul Tajne in support of

the review application, notwithstanding the order dated 14-12-2020, I do not see any reason to take a view different from the view taken and recorded in the order dated 14-12-2020.

11. Civil Application 96/2021 is dismissed.

JUDGE

adgokar