

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 20 OF 2022

1. Santosh S/o. Annarao Shetkar,
Age 45 years, Occ: Agri,
R/o. Fort Road, Udgir,
Tq. Udgir, Dist. Latur.
(G.P.A for Appellant Nos.
3 to 6)
2. Deepak S/o. Annarao Shetkar,
Age : 3 years, Occ: Agri,
R/o. Fort Road, Udgir,
Tq. Udgir, Dist. Latur.
3. Vidyawati W/o. Vishvanath
Bhatmurge
Age: 70 years, Occ: Household,
R/o. Dongapur, Tq. Aurad,
Dist. Latur.
4. Prabhavati W/o. Chandrakant
Karbhari,
Age: 68 years, Occ: Household,
R/o. Biri, Tq. Bhalki, Dist.
Bidar (Karnatak State).
5. Pushpawati W/o Gurunath
Mangrule,
Age: 66 years, Occ: Household,
R/o. Madnur, Tq. Aurad,
Dist. Bidar (Karnatak State)
6. Shobhawati W/o. Gurnath
Biradar,
Age: 63 years, Occ: Household,
R/o. Mainur Road, Bidar
Dist. Bidar (Karnatak State)
7. Shantabai W/o Annarao Shetkar,
Age: 73 years, Occ: Household,
R/o Vijaynagar Colony, Udgir,
Tq. Udgir, Dist. Latur.

8. Vishvanath S/o Manikrao Khelge
Age: 58 years, Occ: Agri,
R/o Niwda, Tq. Aurad, Dist.
Bidar (Karnatak State)
At present Killa Galli, Udgir,
Tq. Udgir, Dist. Beed

...Appellants

Versus

1. Panchfula W/o Shivraj Biradar,
Age 42 years, Occ: Household,
R/o. Tondar, Tq. Udgir,
Dist. Latur.

2. Ahilyabai W/o (Alleged)
Annarao Shetkar, Age 69 years,
Occ: Household, R/o. Nanded
Road, Near Gramin Police
Station, Udgir, Tq. Udgir,
Dist. Latur

...Respondents

Smt. Anjai Dube (Bajpai), Advocate for the Appellants.
Mr. D. A. Madake, Advocate for Respondent No. 1.

CORAM : R.M. JOSHI, J.

RESERVED ON : 28th APRIL, 2023
PRONOUNCED ON : 12th MAY, 2023

JUDGMENT

1. This Appeal under Order XLIII, Rule 1 of Civil Procedure Code (for short 'CPC') takes exception to the order passed below Exh. 26 dated 20th January, 2022 in R.C.A. No. 5/2018.

2. R.C.S. No. 118/1993 was filed by the Plaintiff for partition and separate possession of her undivided share in the suit property. The said suit was decreed

by judgment and decree dated 10th November, 2017. The said judgment is challenged in R.C.A. No. 5 of 2018 which is pending for the decision before the District Court, Udgir. In the said appeal application Exh. 26 was filed by the Appellant Nos. 1 and 2 / Original Defendant Nos. 1 and 2 with the contention that Appellant No. 4 – Prabhavati died on 17.08.2019 i.e., after filing of the appeal. It is further claimed that during her lifetime Appellant No. 3, 5 and 6 have executed registered relinquishment deed dated 24.02.2000 with these appellants in respect of suit land bearing survey nos. 38 and 39 of village Loni, Tq. Udgir. It is further claimed that on death of Appellant No. 4 right to pursue the said appeal survives to these Appellants and also on the basis of relinquishment deed they have right to pursue appeal on behalf of Appellant Nos. 3, 5 and 6.

3. The said application was opposed by the Respondent No. 2 in the appeal denying the contentions of the Appellants. It is further denied that the Appellant No. 4 – Prabhavati died on 17.08.2019 and that these Appellant Nos. 3, 5 and 6 have executed

registered relinquishment deed in favour of the Appellant Nos. 1 and 2 in respect of the suit lands. It is also alleged that if the relinquishment deed was executed on 24.02.2000 there was no reason not to bring the same on record during trial and before passing of judgment and decree by the trial Court. It is also denied that on account of relinquishment deed the entire properties stands transferred in the name of Appellant Nos. 1 and 2.

4. Learned First Appellate Court while passing impugned order has held that there is no reason given for not bringing relinquishment deed on record during the lifetime of Appellant Nos. 4 and 5. It is also observed that there was no opportunity for the Respondents to adduce evidence before the trial Court in respect of relinquishment deed. According to Appellate Court, Appellant Nos. 1 and 2 have not filed pursis restricting their claim to the extent of legal share of the Appellant Nos. 3 to 6. On these grounds, application Exh. 26 came to be dismissed.

5. For the decision of this Appeal, it would be relevant to consider provisions of Section 147 read

with Order XXII, Rule 10 & 11 of CPC, which read as under:

147.Consent or agreement by person under disability.-

In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Order XXII – Death, Marriage and Insolvency of Parties.

10. Procedure in case of assignment before final order in suit.-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

10-A. Duty of pleader to communicate to Court death of a party.-

Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

11. Application or Order to appeals.-

In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

6. The aforesaid provisions show that the principle behind the said provisions is that the suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit. The whole idea behind incorporating the said provision is that the suit may be continued by or against the person with the leave of the Court. Rule 10 of Order XXII is enabling provision and even in the failure of

assignee to make any application will not result into any loss of the right of such assignee. Rule 11 indicates that for the purpose of application under this order to appeal the word Plaintiff shall include an Appellant and the word Defendant as Respondent and suit as an Appeal. This shows that Rule 10 has application even in an Appeal against the judgment of the trial Court in a suit. It being so once such application is made it is incumbent on the part of the Appellate Court, as in the instant case, to conduct an inquiry into the said application and to record findings as to whether Applicants' contention about assignment of the right of any litigating party in the suit property in his favour. Having regard to the nature of the provision it can be held that such assignee can be allowed to continue suit and Appeal as the case may be, with the leave of the Court on creation or devolution of any interest during the pendency of the suit.

7. Having regard to the nature of above provisions and the intention of the legislature behind enacting of the same, it was mandatory for the First

Appellate Court to conduct an inquiry into the claim of the Appellant Nos. 1 and 2 about assignment of the right in suit land bearing survey nos. 38 and 39 by Appellant Nos. 3 to 6 on the basis of registered relinquishment deed dated 24.02.2000. Learned First Appellate Court has held that there was no opportunity to the Respondents to adduce evidence before the trial Court in respect of the relinquishment deed. Such observation is made in total ignorance of the fact that in an application under Rule 10, Order XXII, the Court before which such application is made is expected to conduct an inquiry and record findings in respect of the claim of the applicant. In spite of doing so, the application is rejected on the ground the Respondent did not get an opportunity to lead evidence before trial Court. In view of this Court such finding is not sustainable.

8. Apart from this, application seems to have been rejected also on the ground that the relinquishment deed is executed on 24.02.2000, same was not brought on record before the death of Appellant No. 4. Considering scope of Rule 10, in considered view of

this Court, it can never become a ground for rejection of the application as cause of action would arise for Appellants to file such application at any time during pendency of suit or even in appeal. Moreover, even Respondents do not claim any interest in the suit property to the share of Appellant No. 4. In the backdrop of the averment that there was registered relinquishment deed, it is open for the Appellant Nos. 1 and 2 to satisfy the First Appellate Court about the execution of such relinquishment deed by the assignors.

9. Another factor seems to have prompted the First Appellate Court to reject the application is that the Appellant Nos. 1 and 2 have not filed pursis restricting their claim to the extent of legal share of Appellant Nos. 3 to 6. In this regard it needs to be mentioned that the Appellant Nos. 3 to 6 cannot relinquish any right in the suit properties except to the extent of their share. The determination of the share of the Appellant Nos. 3 to 6 is independent to the present application. Such shares could be decided on the merit at the time of decision of the Appeal and Appellants if succeed in proving assignment, would be

entitled to claim right to that extent.

10. In view of aforesaid discussion, since impugned order is in ignorance of the relevant provisions of the CPC and also without considering the facts on record, it deserves interference. Accordingly, the impugned order is set aside.

11. The application Exh. 26 is relegated back to the First Appellate Court for its decision on merit in accordance with law.

(R.M. JOSHI, J.)

Malani