

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 35 OF 2024

Kalsumbibi Kashim Khanbande .. Appellant

Versus

Abdul Rahiman Fakir Patel and Ors. .. Respondents

...

Mr. G.S. Godbole, Senior Advocate a/w Mr. Rohit D. Joshi, for Appellant.

Mr. Surel Shah a/w Mr. Z. A. Jariwala & Ms. Manasi C. Pandit i/b Mrs. Esha Singh Bhadoria, for Respondent No.1.

Ms. Hafiza Hajimiya Patel, Respondent No.4-in-person, present.

...

CORAM : SANDEEP V. MARNE J.

RESERVED ON : 29 APRIL 2024.

PRONOUNCED ON : 8 MAY 2024.

JUDGMENT :-

1) Appellant have filed this Appeal challenging the Decree dated 29 September 2022 passed by District Court, Panvel dismissing Regular Civil Appeal No.114 of 2019 (Old Regular Civil Appeal No.346 of 2012) and confirming the Decree passed by Joint Civil Judge, Junior Division, Panvel dated 30 July 2012 in Regular Civil Suit No.164 of 2000. By its decree, the Trial Court had dismissed Plaintiff's suit seeking one-fourth share in Plot received from CIDCO under 12.5% scheme as well as her share in the amount of compensation received towards acquisition of the suit property.

2) Plaintiff and Defendant Nos.1 and 5 are siblings. Defendant No.2 is the wife of Plaintiff's deceased brother late Hajimiya Patel and Defendant Nos. 3 and 4 are children of Defendant No.2. Plaintiff's father late Fakir Abdul Rahiman Patel owned various lands as well as house properties at village Owe as more particular described in para 2 of the plaint. All the said properties of late Fakir Abdul Rahiman Patel came to be acquired by the State Government for establishment of Navi Mumbai, City and were handed over to City and Industrial Development Corporation of Maharashtra (**CIDCO**). Plaintiff averred in her Plaint that after acquisition of various lands, compensation was received during lifetime of her father and the entire proceedings relating to acquisition and compensation were looked after by her brother (Defendant No.1). That Plaintiff was not aware about the exact amount received by Defendant No.1 towards compensation and she guessed that the amount of compensation could be to the tune of Rs.7,00,000/-. She further claimed that enhanced compensation was also paid by the Land Acquisition Officer, accounts of which were available with the first Defendant.

3) Plaintiff further averred that a scheme was implemented by State Government for allotment of 12.5% plot in lieu of acquired land. That accordingly, towards acquired lands of her father, CIDCO allotted certain plot and that Defendant No.1 was in the process of selling the said plot received under 12.5% scheme by ignoring Plaintiff's claim. Plaintiff claimed one-fourth share in such plot received under 12.5% scheme. On this cause of action, she instituted Regular Civil Suit No.164 of 2000 (Old Special Civil Suit No.119 of 1997). She claimed one-fourth share in plot received under 12.5% scheme and also claimed share in the amount of compensation.

4) It appears that during pendency of the suit, a Development Agreement came to be executed in October 2009 by Plaintiff, Defendant Nos. 1 and 5 in favour of M/s Paradise Group, under which development rights in respect of area admeasuring 4580 sq. mtrs. out of total area of 6870 sq. mtrs. was granted in favour of Paradise Group. The Agreement was executed on a premise that the entire family was to receive plot admeasuring 6870 sq. mtrs. under 12.5% scheme from CIDCO. However, since Defendant Nos. 2, 3 and 4 (heirs of deceased brither Hajimiya) were not party to the Development Agreement, their share of 2290 sq. mtrs. was kept aside and the Development Agreement was executed only in respect of area admeasuring 4580 sq. mtrs. The Agreement divided entitlements of Defendant No.1 as 2780 sq. mtrs., Plaintiff 900 sq. mtrs. and Defendant No.5 900 sq. mtrs. Accordingly, each party to the Development Agreement was paid consideration corresponding to their respective areas.

5) When Plaintiff's suit came up for hearing, the Trial Court proceeded to dismiss the same by Judgment and Decree dated 30 July 2012 by referring to the Development Agreement. The Trial Court considered Muslim Law of Inheritance and held that Plaintiff was entitled to one-sixth share in the total area of 6870 sq. mtrs. received under 12.5% sq. mtrs. The Trial Court accordingly ascertained the share of Plaintiff at 1145 sq. mtrs. After referring to the Development Agreement, the Trial Court held that though Plaintiff was entitled to receive share of 1145 sq. mtrs. area, she willingly accepted rights in respect of 900 sq. mtrs. and accordingly waived her right and took benefit of less area of suit property. The Trial Court accordingly held that nothing remained to be partitioned and accordingly dismissed the suit.

6) Plaintiff filed Regular Civil Appeal No.346 of 2012 challenging the Trial Court's Decree, which was renumbered as Regular Civil Appeal No.114 of 2019 in District Court, Panvel. In her Appeal, Plaintiff filed application for amendment of Plaint, which came to be allowed by Order dated 22 April 2019 and Plaintiff incorporated paragraphs 5a and 5b in the plaint. In paragraph 5a, she contended that the total entitlement of the family under 12.5% scheme was 8600 sq. mtrs. whereas Plot admeasuring 6870 sq. mtrs. was allotted and balance area of 1730 sq. mtrs. was yet to be allotted to the family. Reliance was placed in this regard on CIDCO's letter dated 17 September 2012. She further pleaded that though her share in 6870 sq. mtrs. was 1145 sq. mtrs. She was granted development rights only in respect of land admeasuring 900 sq. mtrs. and that therefore she is entitled to receive additional area of 245 sq. mtrs. Thus, earlier deficit area of 245 sq. mtrs. + one-sixth share in balance allottable area of 1730 sq. mtrs. i.e. 288 sq. mtrs., total area 533 sq. mtrs. was Plaintiff's entitlement as pleaded in amended para 5b of the plaint.

7) The First Appellate Court however proceeded to dismiss Appellant's Appeal holding that CIDCO's letter dated 17 September 2012 issued under Right to Information Act 2005 cannot be the basis for claiming any right in respect of remaining land of 1730 sq. mtrs. for partition. It held that Plaintiff failed to establish existence of remaining area. The First Appellate Court held that no further area remained for partition and proceeded to dismiss the Appeal.

8) Aggrieved by the decree of the Trial Court as merged in the decree of the First Appellate Court, Appellant has filed a present Appeal. The Appeal has been admitted by Order dated 1 March 2024 by framing following substantial questions of law:

- i) *Whether it was incumbent for the First Appellate Court to frame an additional issue under provisions of Order 41 Rule 25 of the Code in respect of amended pleadings in paragraphs 5a and 5b of the plaint?*
- ii) *Whether the First Appellate Court would have denied relief to the Plaintiff/Appellant even after holding that she is entitled are of 1145 square meters only on the basis of covenants in development agreement executed in October 2009?*
- iii) *Whether development agreement executed in October 2009 would amount to relinquishment of right by the Appellant in respect of area admeasuring 245 square meters?*

9) Mr. Shah appears on behalf of Respondent No.1 (Defendant No.1). Notices were issued to Respondent Nos. 2 to 6. Mr. Joshi, the learned Advocate on record for the Appellant has filed Affidavit of Service of notices on behalf of Respondent Nos.2 to 6. Respondent No.4 Hafiza Hajimiya Patel appeared in person during the course of hearing of the Appeal on 29 April 2024 on behalf of Respondent Nos. 2 to 4. However it appears that Respondent Nos. 2 to 4 neither filed written statement nor had appeared before the Trial Court. Similar was the position in respect of Respondent No.6. Accordingly, the suit proceeded *ex-parte* against Respondent Nos.2 to 6. Even in the Appeal before the First Appellate Court, apparently Respondent Nos.2 to 6 did not participate and the Appeal was decided *ex-parte* against them.

10) Mr. Godbole the learned Senior Advocate appearing for Appellant would submit that the First Appellate Court erred in framing an additional issue under provisions of Order XLI Rule 25 of Code of Civil Procedure in respect of amended pleadings in paragraphs 5a and 5b of the plaint. That the First Appellate Court has erroneously proceeded to ignore CIDCO's letter dated 17 September 2012 as the same was not disputed by the contesting Defendants. That if first Appellate Court had any doubt about

the said letter or entitlement of the family to receive land admeasuring 8600 sq. mtrs. from CIDCO, it ought to have remanded the suit before Trial Court by framing an additional issue under Order XLI Rule 25 of the Code and procured finding of the Trial Court on such additional issue.

11) Without prejudice, Mr. Godbole would submit that the first Appellate Court has erred in holding that there is waiver of right by the Appellant on account of acceptance of consideration in respect of lesser area in the development agreement. That in law there is no concept of waiver in respect of immovable property. That rights in immovable property can only be released or given by executing a registered relinquishment deed. In support of his contentions, he would rely upon judgment of Apex Court in *Yellapu Uma Maheswari and Another Vs. Buddha Jagdheeswararao And Others.*¹ and of this Court in *Gangaram Sakharām Dhuri Vs. Gangubai Raghunath Ayare and Others.*²

12) Mr. Godbole would further submit that the First Appellate Court though rightly held that there is no relinquishment by Appellant, it erroneously proceeded to deny right to her in respect of deficit area of 245 sq. mtrs. on the ground that there is no area left with the family for partition. That this erroneous finding is recorded by ignoring CIDCO's letter dated 17 September 2012. That said letter clearly shows availability of additional area admeasuring 1730 sq. mtrs., from which Plaintiff's deficit area 245 sq. mtrs. *plus* her one-sixth share in the additional area that is 288 sq. mtrs., totally admeasuring 533 sq. mtrs. could easily have been granted to Plaintiff's share.

¹ (2015) 16 SCC 787

² 2007(5) Mh.L.J. 136

13) Mr. Godbole would further submit that Trial Court and the First Appellate Court have erred in ignoring Plaintiff's claim in respect of share in compensation amount, which is fully enjoyed by Defendant No.1 to the exclusion of other brother and two sisters.

14) *Per contra*, Mr. Surel Shah the learned counsel appearing for Respondent No.1 (Defendant No.1) would oppose the Appeal and support the decrees of the Trial Court and the First Appellate Court. He would submit that Plaintiff specifically gave up her claim in respect of so called deficit area of 245 sq. mtrs. by executing Development Agreement during pendency of the suit. Mr. Shah would take me through the cross examination of Plaintiff to demonstrate that she accepted her entitlement in the land received under 12.5% scheme as per the Development Agreement. That she specifically admitted in cross examination that she had no objection for passing decree in accordance with the share granted to her in the Development Agreement.

15) Mr. Shah would further submit that a waiver can also be treated as intentional relinquishment of known right and in support of his contention, he would rely upon judgment of the Apex Court in ***ARCE Polymers Private Limited Vs. Alphine Pharmaceuticals Private Limited & Ors.***³

16) Mr. Shah would further submit that the compensation was received by the father during his lifetime and that therefore there is no question of Plaintiff claiming any share in the amount of such compensation. That there is admission in the plaint about payment of compensation during father's lifetime. That mere Power of Attorney executed in favour of

³ (2022) 2 SCC 221

Defendant No.1 by father does not mean that the amount of compensation was received by Defendant No.1. He would pray for dismissal of the Appeal.

17) Rival contentions of the parties now fall for my consideration.

18) The cause of action for Plaintiff for institution of Old Special Civil Suit No.119 of 1997, which was renumbered as RCS No.164 of 2000, was her apprehension about Defendant No.1 attempting to dispose of plot received under 12.5% scheme in lieu of acquisition of her father's land at village Owe. At the time of filing of the suit, she was apparently not aware about the exact area of plot, which was granted or which was grantable to the family under 12.5% scheme. She merely claimed that in her capacity as daughter, she was entitled to one-fourth share in her father's property, which included both amount of compensation as well as plot allotted under 12.5% scheme. During pendency of the suit, it appears that the exact area of plot allottable to the family under 12.5% scheme got ascertained, which was 6870 sq. mtrs. Thus, plot admeasuring 6870 sq. mtrs. was to be allotted by CIDCO to the heirs of late Fakir Abdul Rahiman Patel at village Owe, Kharghar, Taluka Panvel, District Raigad. The family agreed that in the said plot admeasuring 6870 sq. mtrs. the shares of family members were as under:

- i) Abdul Rahiman Fakir Patel (Defendant No.1) **2780 sq. mtrs.**
- ii) Saruma Hajimiya Patel, Nafisa Hajimiya Patel and Hafija Hajimiya Patel (Defendant Nos.2 to 4) **2290 sq. mtrs.**
- iii) Julekha Yusuf Patel (Defendant No.5) **900 sq. mtrs.**
- iv) Kulsumbibı Kasim Khanbande (Plaintiff) **900 sq. mtrs.**

19) Plaintiff and Defendant Nos.1 and 5 decided to assign their shares in the said plot received under 12.5% scheme in favour of

M/s. Paradise Group. Accordingly, a Development Agreement came to be executed in favour of M/s. Paradise Group in October 2009 by Plaintiff, Defendant No.1 and Defendant No.5 for consideration Rs.2,51,90,000/-. In respect of her share admeasuring 900 sq. mtrs., Plaintiff received the consideration as agreed in the agreement. Thus with execution of the Development Agreement in October 2009, Plaintiff's grievance of denial of any share in plot under 12.5% scheme no longer subsist. This appears to be the reason why Plaintiff gave following admissions in her cross examination:

“मी प्रतिवादी क. १ व प्रतिवादी क.५ यांनी भुसंपादनापोटी मिळणारे मुखंड हे में. पॅराडाईज ग्रुप श्री.मनिष मधु भटीजा या बांधकाम व्यावसायिकांना विकण्याचा करार केला व त्या करारापोटी काही रक्कम आम्ही स्विकारली प्रत्येकी नउ भुखंडाचे पैसे मला व प्रतिवादी क.५ ला व उर्वरीत २७८० चौ मिटर भुखंडाचे पैसे प्रतिवादी क.१ ला देणेचे ठरले. ठरलेल्या व्यवहाराप्रमाणे में. पॅराडाईज ग्रुप मनिष भटीजा यांनी मला प्रतिवादी क.१ व प्रतिवादी क.५ ला प्रत्येकी रक्कम रु ११,००,०००/- दिले. त्यानंतर मला रक्कम रु. २१७५००० सदर मनिष भटीजाकडून मिळाले. माझ्या बहिणीला सुध्दा रु.२१,७५,०००/- मनिष भटीजाकडून मिळाले. प्रतिवादी क.१ ला मनिष भटीजा कडून रु ७१,५०,०००/-, रु.११,००,०००/- व्यतिरिक्त मिळाले. मी पॅराडाईज ग्रुप साठी सदर जमीन विकीचा करार लिहून दिला आहे. प्रतिवादी क.१ ने या प्रकरणात दाखल केलेला करार मला मान्य आहे. मला आता नि ५८ सोबतचा करार दाखविला तो मला मान्य व कबुल आहे. सदर करारावर माझ्या सहया आहेत. सदर करारावर प्रतिवादी क.१ ची सही व प्रतिवादी क.५ चा अंगठा आहे. सदर कराराला नि.६८ देणेत आला साक्षीदाराने सदरचा दस्त मान्य केल्याने त्याला निशाणी देणेत आला आहे. मिळालेल्या रक्कमेबाबत मी पावत्या करून दिल्या आहेत, तसेच प्रतिवादी क.१ व ५ यांनी मिळालेल्या रक्कमेबाबत पावत्या केल्या आहेत मनिष भटीजा यांनी पुढील रक्कम देण्याचे बंद केले आहे. पॅराडाईज ग्रुप तर्फे मनिष भटीजा यास या दाव्यात पार्टी का केले नाही याचे कारण मी सांगू शकत नाही. मी ठरल्याप्रमाणे वागण्यास तयार आहे. मी, प्रतिवादी क.१ व प्रतिवादी क.५ ठरलेल्या व्यवहाराप्रमाणे पॅराडाईज ग्रुपसोबत वागणेस तयार आहे. मनिष भटीजा याने पुढील रक्कम देण्याचे बंद केल्यानंतर वाद मिळकती आम्ही दुस-यास अदयापर्यंत विकलेल्या नाहीत. मी नि.४२ वर दाखल केलेल्या अर्जावर दुरुस्तीचा हुकूम झाला परंतु सदरची दुरुस्ती वेळेत पूर्ण न केल्याने नंतर मला परवानगी दिली नाही. त्या आदेशाविरुद्ध मी दाद मागितली नाही. माझे, प्रतिवादी क.१ व ५ यांच्यात संपादीत मिळकतीबाबत मिळणा-या भुखंडाबाबत जसा करार झाला तसा हुकूम झाल्यास माझी हरकत नाही.”

(emphasis added)

20) Plaintiff thus not only agreed that she received consideration in respect of her share in the plot as per the agreement, but ultimately conceded that she had no objection if decree was passed as per the agreement. This admission on the part of the Plaintiff clearly shows that she had no claim left at-least *qua* plot granted under 12.5% scheme after execution of the Development Agreement of October 2009. It is therefore

quite incomprehensible as to why Plaintiff was still contesting the suit. In fact, after having received considering corresponding to her agreed share, and when she had no grievance left *qua* plot admeasuring 6870 sq. mtrs, for unfathomable reason, Plaintiff filed her Affidavit of Evidence on 21 July 2011 virtually copying the contents of the Plaint reiterating her claim of one-fourth share in the suit property. She blindly stated in her Affidavit of Evidence that Defendant No.1 was in the process of selling the plot received under 12.5% scheme by denying her any right. Such evidence was given by her contrary to her conduct, where she had already received share of 900 sq. mtrs. in the plot allotted under 12.5% scheme and monetized the same by executing Development Agreement of October 2009. Though she maintained silence about the Development Agreement in her Affidavit of Evidence. One of the possible objectives behind continued participation in the Suit by leading evidence after having sold her agreed share in plot admeasuring 6870 sq. mtrs, could be to cement the agreed shares as per the development agreement of October 2009 in the form of decree of the Court. Be that as it may. She gave above admissions in her cross examination and ultimately agreed for passing of decree in accordance with share determined in the Development Agreement. In my view, therefore no flaw can be found in the Trial Court's Decree dismissing the suit after noticing that Plaintiff had already received her share in the plot in the form of Development Agreement.

21) Mr. Godbole has pointed out two flaws in the Trial Court's Decree viz. assuming waiver of her right *qua* deficit area of 245 sq. mtrs. and denying her right in the amount of compensation.

22) So far as Plaintiff's right to receive share in amount of compensation is concerned, the plaint itself contains an admission that the

compensation was paid during the lifetime of her father. During lifetime of her father, Plaintiff had no right to receive any share in father's property. Therefore, there is no question of she being granted any share in the amount of such compensation. Merely because Defendant No.1 may have looked after proceedings for payment of compensation by acting as constituted attorney of father, the same does not mean that the compensation is paid to Defendant No.1. Since it is received during the lifetime of her father, it is required to be treated as having being paid to the father, in which Plaintiff could not have claimed any share.

23) So far as the second error of the Trial Court about waiver of Plaintiff's right is concerned the same is being dealt with in the paragraphs to follow. It will be necessary to deal with what happened before the first Appellate Court.

24) When Plaintiff filed Appeal before the First Appellate Court, which against is quite incomprehensible after receiving her share as per Development Agreement and after admitting in the cross examination that she desired a decree in terms of Development Agreement. Be that as it may. She appears to have grown wiser during pendency of the Appeal and filed application for amendment of the Plaint on 12 April 2018 for incorporating paragraphs 5a and 5b therein. The amendment application was allowed by Order dated 2 March 2019 and following paragraphs came to be added in the plaint.

“५अ. शासनाने दावा मिळकतीपैकी ज्या मिळकती संपादित केल्या त्याबदली साडेबारा योजनेअंतर्गत सिडकोने फकीर पटेल अब्दुल रहिमान पटेल यांना ओवे खारघर संचिका कमांक २१४ मध्ये १०५०+४२५०+३५०+२००+२७५० चौ.मी. एकूण ८६०० चौ.मी. असुन त्यापैकी मौजे खारघर सेक्टर ३५ आय भुखंड ३९ क्षेत्र ६८७० च्या भुखंडाचे वाटप झालेले आहे व अद्याप १७३० चौ.मी. चा भुखंड सिडकोकडून मिळण्याचा आहे. तसे पत्र सिडकोने ता. १७/०९/२०१२ रोजी दिलेले आहे.

५ब. अपेलंटच्या हिश्याला ६८७० पैकी ६वा हिस्सा ११४५ चौ.मी. येतो पैकी ९०० चौ.मी.चे भूखंड वर नमूद केल्याप्रमाणे मे. पॅराडाईज ग्रूपला दिले. त्यामुळे २४५ चौ.मी. भूखंड अपेलंटला मिळण्याचा बाकी आहे. त्यातील

अपेलंटच्या ६वा हिस्सा मानला तर २८८ चौ.मी. भूखंड अपेलंटला मिळण्याचा हक्क आहे. असे एकूण अपेलंटला ५३३ चौ.मी.चे भूखंड तिचे हिश्याला मिळणे आवश्यक आहे. परंतु वादी यांना तिचे हिश्याचे १७३० चौ.मी. क्षेत्राचे भूखंड मिळण्याकरीता दाव्यातील मागणीप्रमाणे वाटपाचा हुक्मनामा व्हावा.”

25) It appears that the Trial Court also allowed Plaintiff to lead additional evidence in the form of CIDCO's letter dated 17 September 2012 by Order dated 22 April 2019, which reads thus:

नोंदणीकृत कार्यालय:

निर्मल, दुसरा मजला, नरीमन पॉईंट, मुंबई-४०००२१.

दूरध्वनी (स्वागत कक्ष)+ ९१-२२-६६५००९००

फॅक्स: + ९१-२२-२२०२२५०९

मुख्य कार्यालय:

सिडको भवन, सीबीडी बेलापूर, नवी मुंबई-४००६१

दूरध्वनी: + ९१-२२-६७९९८९००

फॅक्स: + ९१-२२-६७९९८९६६

संदर्भ क्र.: क्रमांक सिडको/भूमि/साटयो/खारघर 214/ माय 237/2012/498

दिनांक 17/9/2012

प्रति,

कुलसुम बी. काशीम खानखंदे,

खानबंदे अपार्टमेंट, तिसरा मजला,

रूम नं.301, कळवा, ठाणे- 400605

विषय: माहितीचा अधिकार अधिनियम 2005 अन्वये माहिती पुरविण्याबाबत

संदर्भ: आपला दिनांक 30/8/2012 चा अर्ज.

महोदय,

आपला उपरोक्त विषयाचा दिनांक 30/8/2012 चा अर्ज या विभागात दिनांक 6/9/2012 रोजी प्राप्त झाला आहे. सदर अर्जानुसार आपणांस कळविण्यांत येते की ओवे खारघर संविधा क्र.214 मध्ये श्री फकीर पटेल अ रहेमान पटेल यांच्या 1050-4250+350+200+2750 पात्रतेपोटी मौजे खारघर सेक्टर 35 आय भूखंड क्र.39 क्षेत्र 6870 चौ.मी वाटप करण्यांत आलेला आहे. परंतु अद्याप करारनामा करण्यात आलेला नाही कळावे.

आपला विश्वासू

जन माहिती अधिकारी तथा

अति. मुख्य भूमि व भूमापन अधिकारी

26) The First Appellate Court has however proceeded to dismiss Plaintiff's Appeal by holding that CIDCO's letter dated 17 September 2012 did not establish that any additional area was grantable to the family.

27) It is Appellant's contention that as per CIDCO's letter dated 17 September 2012, the area which was required to be allotted to her father

under 12.5% scheme is $1050 + 4250 + 350 + 200 + 2750$, total of which comes to 8600 sq. mtrs. According to Plaintiff since only 6870 sq. mtrs. was allotted so far, the family is entitled to allotment additional area of 1730 sq. mtrs. Plaintiff claims that in respect of area of 6870 sq. mtrs. earlier allotted, she is entitled to deficit area of 245 sq. mtrs. (one-sixth share of 1145 sq. mtrs. less 900 sq. mtrs. received under Development Agreement). She further claims that out of additional area of 1730 sq. mtrs. she is entitled to one-sixth share of 288 sq. mtrs. This is how she claims entitlement to additional area of $245 + 288 = 533$ sq. mtrs.

28) The First Appellate Court has proceeded to reject Plaintiff's case for additional area of 533 sq. mtrs. by holding that there is no land left to the family from the suit property to be partitioned. The relevant findings are in para 20 of the Order of the First Appellate Court, which reads thus:

"20. In the light of foregoing, it is apparent that by virtue of admitted document of agreement, parties have disposed of area of suit property in favour of builder as such, there is no land left to the family from the suit property. Since there is no land liable for partition, hence there is no question as to partition and separate possession of the share of plaintiff in terms of her prayer. I answer Point No.3 in the negative."

29) The First Appellate Court has held that the Defendant No.1 did not raise any plea of relinquishment of her share and that there is no Deed of Relinquishment executed by Plaintiff. However, the First Appellate Court considered the admissions given by Plaintiff in her cross examination and therefore held that land admeasuring 245 sq. mtrs. was not left for being allotted to Plaintiff's share. The finding of the First Appellate Court in para 12, 15 and 16 of its judgment are as under:

"12. The parties agreed by the virtue of this agreement that the suit properties are acquired by the State Government. Thus, name of CIDCO is

incorporated to the revenue record. The parties have right to extent of 12.5% area in lieu of this acquisition. Thus by virtue of this acquisition under the scheme of 12.5%, the area of suit properties is to the tune of 6870 sq.m. This entire area of 6870 sq. m is assigned to the said builder M/s. Paradise Group. There is no averment mentioned in the said agreement that beside this area of 6870 sq.m. any other area from the landed suit properties is still left to the parties. Further by virtue of this agreement, the plaintiff assigned area to the extent of 900 sq.m. Defendant No.5 assigned 900 sq.m area and the defendant No.1 assigned area to the extent of 2780 sq.m. Thus the total area of 6870 sq.m. is disposed of. During the course of cross-examination on behalf of defendant, the plaintiff admitted that she has no objection for the partition in the terms of said agreement.

15. *Admittedly in the said agreement, there is no specific mention that area of plaintiff and defendant no. 5 remained to the extent of 245 sq.m. is left. Further, there is no mention in the said agreement that besides area 6870 sq.m., the family has any other area from these suit properties subjected for partition and separate possession. The plaintiff has not put grievance about this document of agreement. She has not pleaded that after disposition of 900 sq.m by her, the area of 245 sq. m is still left with her and the brother defendant No.1 has assigned more area of her right in favor of M/s. Paradise Group. In absence of specific pleading, the contention of plaintiff that area to the extent of 245 sq.m remained, is not well founded.*

16. *It is settled position of law that the court cannot travel beyond pleadings of the parties. The defendant by filing written statement specifically contended this fact, however there is no plea of relinquishment of right as well as there is no deed of relinquishment by her. However in the light of her execution of agreement coupled with her admission during the course of cross-examination also she has not raised grievances about the agreement then in that eventuality, irresistible conclusion is drawn that she has made disposition of her share by accepting area to the extent of 900 sq.m in place of 1145 sq. m. The area to the extent of 245 sq.m is not left to the share of plaintiff liable for partition. Thus I answer Point No. 1 in the negative.”*

30) Mr. Godbole contends that if First Appellate Court was to accept contents of CIDCO letter dated 17 September 2012, it would have easily held that additional area of 1730 sq. mtrs. is available for allotment, from which Plaintiff's entitlement of $245 + 288 = 533$ sq. mtrs. can easily be adjusted. According to him, the first Appellate Court has erred in ignoring CIDCO's letter and holding that no additional area is available for the family for effecting any partition.

31) I am unable to agree with the submissions of Mr. Godbole for variety of reasons. Plaintiff's frame of the suit was premised on vague allegation of denial of share by Defendant No.1 in plot receivable under 12.5% scheme. At that time, she was not even aware about the exact area, which the family was about to receive. After the entitlement of area of family got ascertained at 6870 sq. mtrs. during pendency of suit, Plaintiff executed Development Agreement in October 2009 admitting that her entitlement in that plot was only 900 sq. mtrs. In this regard the relevant clause in the Development Agreement reads thus:

उ) सदर १२.५% गावठाण विस्तार योजनेअंतर्गत प्रथम पक्षकार/लिहून देणार यांना मिळणाऱ्या सुमारे ४५८० चौ.मी. क्षेत्रफळाच्या भूखंडाबाबत पात्रता १) श्री. अब्दुल रहमान पटेल-२७८० चौ. मी., २) श्रीमती जुलेखा युसूफ पटेल-१०० चौ.मी ३) श्रीमती कुलसुमबीबी काशीम खानबंदे-१०० चौ.मी.) प्रथम पक्षकार/लिहून देणार यांनी योग्य त्या मोबदल्याच्या बदल्यात सदर भूखंडातील भाडेपट्टा हक्कांचा हस्तांतरण करून सदर भूखंडाचा विकास करण्याची इच्छा दुसरे पक्षकार/लिहून घेणार यांच्याकडे व्यक्त केली. त्यानुसार दुसरे पक्षकार/लिहून घेणार यांनी सदर भूखंडातील प्रथम पक्षकार/लिहून देणार यांचे भाडेपट्ट्याचे हक्क खरेदी घेवून भूखंडाचा विकास करण्यास समंती दिली.”

32) When Plaintiff filed Affidavit of Evidence dated 21 July 2011, she knew about the total plot area granted by CIDCO of 6870 sq. mtrs. and grant of share to her of 900 sq. mtrs. in the Development Agreement. She however did not depose in her Affidavit of Evidence that there was deficit area of 245 sq. mtrs. which was receivable by her after execution of the development agreement. As observed above, she virtually copied the plaint in the Affidavit of Evidence, which was otherwise silent about total plot area and about Plaintiff's exact entitlement. Thus, there is no foundation by Plaintiff before Trial Court in the form of pleadings, much less evidence, about she having received lesser area after execution of the development agreement. On the contrary, she admitted in the cross examination that she desired a decree in terms of shares allotted in the Development Agreement. In that view of the matter, Plaintiff cannot claim that she is entitled to deficit area of 245 sq. mtrs. in respect of plot admeasuring 6870 sq. mtrs.

33) There is debate between the parties on the issue of waiver amounting to relinquishment of right in a immovable property. According to Mr. Godbole, such relinquishment can only be by way of a registered deed and mere conduct does not amount of relinquishment. He has relied on the judgments of the Apex Court in ***Yellapu Uma Maheswari*** (supra) and of this Court in ***Gangaram Sakharam Dhuri*** (supra). However both the judgments deal with the issue of requirement of registration of deed by which relinquishment is effected. Mr. Shah, on the other hand, has relied upon judgment of the Apex Court in ***ARCE Polymers Pvt. Ltd.*** (supra) in which the Apex Court as held in Paragraphs 16 and 17 as under:

“16. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favorable-decision. The fact that the other side has acted on it, is sufficient consideration.

17. It is correct that waiver being an intentional relinquishment is not to be inferred by mere failure to take action, but the present case is of repeated positive acts post the notices under Sections 13(2) and (4) of the SARFAESI Act. Not only did the borrower not question or object to the auction of the Bank, but it by express and deliberate conduct had asked the Bank to compromise its position and alter the contractual terms. The borrower wrote repeated request letters for restructuring of loans, which prayers were considered by the Bank by giving indulgence, time and opportunities. The borrower, aware and conscious of its rights, chose to abandon the statutory claim and took its chance and even procured favourable decisions. Even if we are to assume that the borrower did not waive the remedy, its conduct had put the Bank in a position where they have lost time, and suffered on account of delay and laches, which aspects are material. Auction on the subject property was delayed by more than a year as at the behest of the borrower, the Bank gave them a long rope to regularise the account. To ignore the conduct of the borrower would not be reasonable to the Bank once third-party rights have been created. In this background, the principle of equitable estoppel as a rule of evidence bars the borrower from complaining of violation.”

34) In my view, in the present case, Plaintiff in addition to execution of Development Agreement admitting her share of 900 sq. mtrs. has also

given specific admissions before the Trial Court. She even requested the Trial Court to pass a decree as per those shares in the development agreement. Therefore, this is not a simple case of waiver by conduct. It is a case of agreement between the brother and two sisters, where the sisters agreed to waive of share of 245 sq. mtrs each exclusively in favour of Defendant No. 1, who took higher share of 2780 sq. mtrs. as compared to his other brother who was given normal share of 2290 sq. mtrs. The higher share of 2780 sq. mtrs is after taking a pie of 245 sq. mtrs from each sister. Once Plaintiff gave away her share of 245 sq. mtrs to her brother by development agreement, is she had any grouse that the said area of 245 sq. mtrs was taken away by Defendant 1 through misrepresentation, fraud or coercion, she ought to have set up such case by amending the Plaint and leading evidence. Far from doing so, she actually deposed in her cross examination that she was ready to have suit decreed as per the shares agreed in the development agreement. Thus, this is not a case of simple waiver by conduct but a case of voluntarily not persecuting the claim towards the alleged deficit area of 245 sq. mtrs. What is expressly given up before the Trial Court cannot be permitted to be revived on the basis of subsequent issuance of letter dated 17 September 2012 (after dismissal of the suit) by CIDCO. Also, though Plaintiff filed appeal challenging the decree of Trial Court and though filing of appeal would amount to continuation of suit, Plaintiff cannot be permitted to wriggle out what she specifically sought in her cross examination (decree in terms of shares as per development agreement) by subsequent amendment in the Plaint at the appellate stage.

35) Thus, alleged entitlement of the family for additional area of 1730 sq. mtrs as per CIDCO's letter dated 17 September 2012 does not revive what Plaintiff's specifically gave up before the Trial Court. If indeed CIDCO grants or allots additional area of 1730 sq. mtrs., Plaintiff would be

entitled to one-sixth share of 288 sq. mtrs. therein. With a view to obviate any further litigation between the parties in respect of entitlement in said additional area of 1730 sq. mtrs., Mr. Shah has fairly stated that Defendant No.1 has no objection for grant of one-sixth share of 288 sq. mtrs. to Plaintiff if and when CIDCO allots additional area of 1730 sq. mtrs. to the family. In fact, an affidavit to this effect is filed by Respondent No.1.

36) Respondent No. 4 has appeared in person and complains about denial of any share in the allotted plot to heirs of Late Hajimia, It appears that under the Development Agreement of October 2009, share of Saruma Hajimiya Patel, Nafisa Hajimiya Patel and Hafija Hajimiya Patel (Defendant Nos.2 to 4) to the extent of area of 2290 sq. mtrs. is admitted. I do not see any reason why any party to the Suit can object to Defendant Nos. 2 to 4 possessing, dealing with or alienating the area admeasuring 2290 sq. mtrs allotted to Defendant Nos. 2 to 4. They are free to do so.

37) The questions of law framed by this Court are accordingly answered as under:

- i) It was not necessary for the First Appellate Court to frame an additional issue under provisions of Order 41 Rule 25 of the Code in respect of amended pleadings in para 5a and 5b of the plaint as alleged entitlement of additional area of 1730 sq. mtrs. as per CIDCO's letter dated 17 September 2012 does not revive Plaintiff's claim to area of 245 sq. mtrs., which she specifically gave up not just in the development agreement but also during the course of her evidence before the Trial Court.
- ii) The First Appellate Court has rightly denied the relief of area of 245 sq. mtrs. to Plaintiff/Appellant even after holding that her

share in Plot admeasuring 6870 sq. mtrs. was 1145 sq. mtrs. and that she had monetized area of only 900 sq. mtrs. under the Development Agreement of October 2009.

- iii) Development Agreement executed in October 2009 coupled with Plaintiff's evidence amounts giving up rights in respect of area admeasuring 245 sq. mtrs.

38) Considering the overall conspectus of the case, I do not find any valid ground to interfere in the decree passed by the First Appellate Court confirming the Trial Court's Decree. The Second Appeal is devoid of merits. The same is **dismissed** without any orders as to costs. It is however clarified that in the event of CIDCO allotting additional area of 1730 sq. mtrs. in lieu of acquisition of land of late Fakir Abdul Rahiman Patel, Plaintiff will be entitled to one-sixth share admeasuring 288 sq. mtrs. therein.

[SANDEEP V. MARNE J.]