



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

SECOND APPEAL NO. 112/2013

1. Shri Vikas Raghunath Kolhe
Aged about 50 years, Occ. Service,
R/o Amravati, Tq. and Distt. Amravati.

2. Shri Anil Raghunath Kolhe,
Aged about 40 years, Occ. Service.

3. Smt. Anjali w/o Ashok Kolhe
Aged 40 years, Occ. Household work.

4. Ku. Shital D/o Ashok Kolhe,
Aged about 23 years, Occ.- Education.

Nos. 2 to 4 are the residents of
Punarvasan Colony, Morshi, Tq. Morshi,
District- Amravati.

5. Smt. Vijaya w/o Ashok Ladde,
(Dead thr. LRs.)

5-a Niranjan s/o Ashok Ladde,
aged about 45 years, R/o. Chalisgaon,
Dist. Jalgaon.

5-b Vandana Vilas Vishwekar,
aged about 55 years,
R/o. 202, Nelco Society,
Subhash Nagar, Nagpur-22.

5-c Vaishali Pradip Eskay,
aged about 51 years,
R/o. Dupare Layout,
Swavalambi Nagar, Nagpur- 22.

5-d Urvashi Shekhar Sharma,
aged about 36 years,
R/o. Chalisgaon, Dist. Jalgaon.

6. ~~Sau. Alka w/o Shekhar Shivankar~~
(Deleted)

7. ~~Sau. Subha w/o Subhash Wale~~
(Deleted)

.....APPELLANTS

...VERSUS...

Kamlakar s/o Bapurao Kolhe,
 aged about 63 years, Occ.Business
 R/o C/o Sadhana Bakery, Manjurpura,
 Aurangabad, Distt Aurangabad through
 its LRs.

1. Smt. Suman Kamlakar Kolhe,
 Aged about 54 years. Occ. Household,
2. Sau. Archana Sanjay Sangekar
 Aged about; 33 years, Occ. Household,
 R/o Infront of Datta Mandir,
 In front of Sangekar frame Maker,
 Inside Amba Gate, Amravati
3. Jitendra Kamalkar Kolhe,
 Aged about: 24 years, Occ. Business,
4. Ku.Kalyani Kamlakar Kolhe,
 Aged about 15 years, (Minor through natural
 guardian Mother /respondent No.1)

Non-applicant Nos.1,3 and 4 are
 R/o Plot no. 132, Naval Apartment,
 Flat No.9, Ulka Nagri, Near Ramayana
 Cultural Hall, Aurangabad.

5. Sau Alka w/o Shekhar Shivankar,
 Age 68 years, R/o C-305, Crown,
 Vasant Marvel, Off. Western Express Highway,
 Borivali (East), Mumbai - 400066.
6. Sau. Sulabha w/o Subhash Wale,
 Age 53 years, R/o Plot No. 31-A,
 Lal Bahadur Shastri Nagar,
 Near Nayjeevan Blood Bank,
 Dhule - 424001

...RESPONDENTS

Mr. A. D. Mohogaonkar, Advocate for appellants.
 Mr. N. R. Saboo, Advocate for respondents.

CORAM:- ANIL L. PANSARE, J.

DATE OF RESERVING THE JUDGMENT : 16.04.2024

DATE OF PRONOUNCING THE JUDGMENT : 23.04.2024

Heard Mr. A. D. Mohogaonkar, learned counsel for the appellants and Mr. N. R. Saboo, learned counsel for the respondents.

2. Vide order dated 08.02.2016, the appeal was admitted on the following substantial questions of law.

“(A) The learned trial court and appellate court failed to appreciate the facts and evidence lead by the appellants. That both the lower courts failed to give importance to the application moved by the respondent for allotment of plots for himself and his mother vide Exh.89 and Exh.90. It is the case of the respondents. that father of appellants received the suit plots on behalf of respondent, his mother and himself as Karta of the family and by virtue of Power of Attorney made by respondent (original plaintiff) and his mother Laxmibai in favour of respondent, in these circumstances there was no need for the respondent to move application for allotment of plots to the Government. The applicants vide Exh.89 and 90 shows the act of respondent contrary to his pleadings. Hence the learned Lower Court ought to have held that the suit plots were allotted to the father of appellants in his individual capacity and not as karta.

(B) The appellate court erred in upholding the reasoning of trial court about point of non-joinder of necessary parties. That the partition is sought for house property and plots. That both the lower courts hold that the sisters are not necessary parties to the

suit, since the sisters cannot claim partition of dwelling house u/s 23 of Hindu Succession Act. That the said section 23 is deleted as per the Amendment Act of 2005 which took effect from 9.9.2005. The judgment is passed by Trial Court on 16.11.2005. Therefore the said provision u/s 23 is not applicable in the instant matter. The trial court as well as appellate court failed to consider this aspect and blindly followed the provisions of law which leased to exist. Therefore the findings of both the lower courts are liable to be set aside and it ought to have hold that the suit is bad for non-joinder of necessary party.

(C) Assuming though not admitting that section 23 of Hindu Succession Act is applicable, in that circumstances it is can be seen that there is bar on seeking partition of dwelling house for the sisters, but once the brothers decide to partition-the house, the sister get her share. The plain meaning therefore is that the sisters have no right to seek partition in the dwelling house but they are entitled for share if the brothers seek partition. That in the instant matter one of the brother sought partition in the house and hence the sisters are entitled for their share in the property and hence they are necessary parties in the suit. The suit filed by the plaintiff is therefore bad for non joinder of necessary parties."

3. The aforesaid questions were reformulated, in following terms.

"Whether the finding rendered by both the Courts below that the disputed plots were allotted to the appellant, respondent and their mother but in the name of appellant, is a perverse, being contrary to the provisions of the Maharashtra Project Affected Persons Rehabilitation Act, 1986?"

4. The appellant no.1 (since deceased) was defendant before the Trial Court. The respondent no.1 (since deceased) was plaintiff. They are being represented by their legal representatives. For the purpose of better understanding, the respondents herein will be collectively referred to as the, "Plaintiff" and the appellants as the, "Defendant".

5. The Plaintiff and the Defendant were brothers. The Plaintiff filed a suit against the Defendant for partition and separate possession of the suit property consisting of three plots, bearing plot Nos. 52, 53 and 54 at mouja Yerla, along with house constructed thereon. According to the Plaintiff, he himself and his brother Defendant and mother Laxmibai were owners of the ancestral house situated on plot No.66, mouja Shirri, district Wardha. The said plot and the house was acquired by Government of Maharashtra for Upper Wardha Project. In view thereof, compensation of Rs.6655/- was paid to the Plaintiff, Defendant and the mother, in equal proportion. Further, three plots were allotted to them under the rehabilitation programme. The Plaintiff and Laxmibai had executed a Power of Attorney dated 25.06.1975 in favour of the Defendant. In view thereof, three plots were allotted in the name of the Defendant. Laxmibai expired on

18.11.1982. The Plaintiff and Defendant decided to construct a house on the said plots and, accordingly, incurred expenses in equal proportion. The Plaintiff came to know that the Defendant is intending to sell the plots and, therefore, sought partition, which was refused and hence the suit.

6. The question posed before this Court is, whether plot Nos. 52, 53 and 54, allotted in the name of the Defendant were, in fact, allotted to the Plaintiff, Defendant and Laxmibai? The Plaintiff's case is that the Defendant was holding the suit plots for himself and on behalf of the Plaintiff and Laxmibai. Since Laxmibai has expired, the Plaintiff sought half share in the suit plots and the house constructed thereon. Both the Courts below have rendered a concurrent finding in favour of the Plaintiff. Both the Courts held that the Plaintiff and Defendant are joint owners of the suit property and are entitled for partition.

7. Learned counsel for the Defendant contends that the suit plots were allotted to the Defendant and, therefore, the Plaintiff and Laxmibai had no share. He then submits that Plaintiff, in the capacity of a project affected person, even filed applications Exh.89 and 90 for allotment of plots.

8. As against, the learned counsel for the Plaintiff contends that the documents Exh.89 and 90 are not the applications but are complaints made by the Plaintiff for allotting plots in the name of the Defendant.

9. The learned counsel has invited my attention to Section 2 (2) of the Maharashtra Project Affected Persons Rehabilitation Act, 1986 (hereinafter referred to as the, 'Act of 1986), which reads thus.

“2. In this Act, unless the context requires otherwise-

(1)

(2) “affected persons” means—

(a) an occupant whose land in the affected zone (including land in the gaathan) is acquired under section 14 for the purposes of a project;

Explanation.—For the purpose of this sub-clause, where any agricultural land is recorded in the relevant village records in the name of one of the brothers as a Karta or Manager of a Hindu Joint Family, then every brother (or son or sons of any deceased brother all together as one unit) who has a share in the land, whether his name is recorded in such village record or not, shall be treated as affected person;

(b) to (e)”

On the basis of the aforesaid definition, he submits that every brother or son or sons of any deceased brother all together is one unit to share the land/house and will be treated as affected person. He submits that the Plaintiff, Defendant and the mother fall in the said category.

10. He has, then, invited my attention to Section 10(1), which provides as under:

“10. Rehabilitation of Affected Persons.-

(1) The State Government shall in accordance with the provisions made by or under this Act and subject to the availability of sufficient land for the purpose, rehabilitate affected persons from the affected zone under an irrigation project, on land in the villages or areas receiving benefit of irrigation from such project.”

11. The learned counsel, by relying upon the above provision, submits that the State Government is duty-bound to rehabilitate the affected persons on the lands available. Thus, according to him, the Plaintiff, Defendant and Laxmibai were all entitled to be rehabilitated.

12. The learned counsel has then invited my attention to Schedule-IV of the Act of 1986, which provides for entitlement of area of plot to be granted to the affected persons. It provides that, where an affected person is a non agriculturist and if the number of members of his family does not exceed five, the affected persons will be entitled for plot admeasuring 185 Sq. Mts. He submits that the family consisted of three members and accordingly, the plots were allotted in the name of the Defendant. The plots admeasure around 185 Sq. Mts. He submits that the Courts below, therefore, have rightly held that the Plaintiff has established his case.

13. I am in complete agreement with the submissions made by the counsel for the Plaintiff. The facts and evidence led before the Courts would clearly establish that the Plaintiff, Defendant and their mother were residing together. In fact, they have received compensation in equal proportion. All of them were affected persons in terms of Section 2(2) of the Act of 1986. They were entitled for rehabilitation in terms of Section 10 of the Act of 1986. They were entitled for allotment of land admeasuring 185 Sq. Mts.

14. In the circumstances and though the suit plots were allotted in the name of the Defendant, the Plaintiff has proved beyond reasonable doubt that the plots were so allotted for and on behalf of the members of the joint family consisting of the Plaintiff, Defendant and Laxmibai. There is no dispute that Laxmibai has expired. Consequently, the Plaintiff and Defendant will become joint owners of the allotted plots i.e. the suit plots. Both the Courts below have considered the evidence and have rendered a concurrent finding. I do not find nor could the Defendant show that the said finding is perverse.

15. In the circumstances, there is no reason why should this Court interfere with the concurrent findings recorded by the

Courts below. The finding is in consonance with the provisions of the Act, of 1986. The substantial question is accordingly answered in the negative.

16. There is, thus, no substance in the second appeal. The appeal is dismissed with no order as to costs.

(Anil L. Pansare, J.)

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