



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.7188/2024

1. Diwakar Rambhau Shirbhate, through
POA, Chaya W/o Diwakar Shirbhate,
aged about 44 years, Occu. Labour,
R/o Ambada, Tq. Morshi,
Distt. Amravati.
Mobile No. 7741951277
2. Sau. Rekha Ganeshrao Bijwe,
Aged about 55 years, Occu: Household,
R/o. Ghatladki, Tah. Chandur Bazar,
Dist. Amravati.
3. Sau. Shashikala Raju Gulhane
Aged about 47 years, Occu: Household,
R/o. Shirajgaon Kasba, Tah. Chandur
Bazar, Dist. Amravati.
4. Sau. Bebigai Vinodrao Agarkar,
Aged about 40 years, Occu: Household,
R/o. Narkhed, Tah. Narkhed,
Dist. Nagpur.

... PETITIONERS

...VERSUS...

Taibai Kisanrao Ainar,
Aged about 57 years, Occu: Household
R/o. Ambada, Tah. Morshi,
Dist. Amravati.

...RESPONDENT

Mrs. S.W. Deshpande, Advocate for petitioners

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 04/02/2025

DATE OF PRONOUNCING THE JUDGMENT: 27/02/2025

JUDGMENT

. Heard learned Counsel for petitioner.

2. Being aggrieved by the order passed by Joint Civil Judge, Junior Division, Morshi Dist. Amravati below Exhibit No. 45 in R.C.S No. 26/2014 and the impugned order dated 30/01/2016 below Exh. 22 in R.C.S 26/2014.

3. Father of Rambhau i.e. Fakirsa received compensation towards ancestral land situated at Mouza Khanapur, then Taluka Arvi, Distt. Wardha and the ancestral house at Sirshi, Taluka Asthi, Distt. Wardha was acquired by State for upper Wardha Project. Out of that compensation Fakirsa by registered sale deed purchased the suit plot from defendant No. 1 in the name of his son Rambhau, the plaintiff No. 1 in RCS No. 6/2008 and father of defendant/petitioner No. 1 herein. Thereafter, Fakirsa constructed house on the suit plot and the electricity and water connection was also in the name of his son Rambhau, and the entire family of

Fakirsa was living in the said house since 1984. Therefore, the said house was ancestral and joint family property. After the death of Fakirsa, the father of the plaintiff No. 1, Rambhau and grandfather of the plaintiff No. 2 Diwakar, Original Plaintiffs Ramblau Fakirsa Shirbhate and his son Diwakar Rambhu Shirbhate, became the joint owner of house No. 93 (Old house No. 4), situated in Ward No. 4, Gram Panchayat Ambada, Tah. Morshi, Distt. Amravati admeasuring 35 feet East-West and 32 feet South-North bounded as towards East road, towards west Nalla, towards North house of Suresh Lokhande, and towards South house of Rama Uke. Plaintiff No. 1 applied with the Gram Panchayat, Ambada, to record the name of plaintiff No. 2 in the Gram Panchayat, Ambada, record.

4. In the meantime, Rambhau Shirbhate and Diwakar Shirbhate came to know that the respondent-defendant No. 1 with the help of Gram Vikas Adhikari of Gram Panchayat, Ambada, have recorded his name on the suit property. Therefore, the plaintiff Nos. 1 and 2 demanded the relevant documents, however, the respondent No. 3, Grampanchayat, Ambada, Tq. Morshi, Dist. Amravati, was avoiding. Ultimately, the said documents were

sought under Right to Information Act and the plaintiffs came to know that the respondent-defendant No. 1, namely Baldeo Kashinath Mohod filed an application along with his affidavit and on the said application the respondent-defendant No. 3 namely Gram Panchayat, Ambada, Tq. Morshi, Dist. Amravati, passed resolution No. 12/11 on 07/09/2007, whereby, the suit house is mutated in the name of defendant-respondent No. 1 without giving any notice or opportunity for objection to the plaintiffs. Therefore, legal notice was issued to respondent No. 1 and respondent No. 3 for the illegal mutation, which is not at all replied by the respondent Nos. 1 and 3. Therefore, plaintiffs, i.e Shirbhate family filed suit for declaration and injunction, with a prayer to declare the mutation entry in respect of the suit property illegal with further direction to defendant No. 3, Gram Panchayat to mutate the name of Diwakar Rambhau Shirbhate plaintiff No. 2 and declare that the sale transaction between defendant No. 1, Baldeo Kashinath Mohod and defendant No.2 namely Smt. Taibai Kisanrao Aainar dated 04/10/2007, is illegal and not binding on the plaintiffs. The said suit is registered as RCS No. 6/2008 before Civil Judge Junior Division, Morshi, Distt. Amravati. Defendants filed Written

Statement at Exh. 23 and at Exh. 27. The learned Civil Judge Junior Division, dismissed the suit. Being aggrieved by the said order Plaintiffs preferred Regular Civil appeal No. 98 of 2013 before Principal District Judge, Amravati.

5. Taibai Kisanrao Aainar filed RCS No. 26/2014, suit for possession of suit house and for compensation for unauthorized use, against the present petitioners. Petitioners in RCS No. 26/2014 below Exh. 19 filed an application under Order 6, Rule 17 of the CPC, for amendment in written statement, to show that this suit is not maintainable being *res judicata*, as the issue regarding ownership was already decided in RCS No. 6/2008. Plaintiff in RCS No. 26/2014 filed an applicant under Order 14, Rule 5 of C.P.C. for deletion of issue No. I at Exh. 13 in RCS No. 26/2014. Learned Civil Judge Junior Division by order dated 30/01/2016 allowed the application below Exh. 22, so filed by plaintiff and deleted the issue No. 1 regarding ownership of the suit property and also allowed the amendment at Exh. 19. Petitioners-defendants in RCS No. 26/2014 filed an application under Order 10 of the C.P.C. at Exh. 28 on the count that judgment dated 12/04/2013 in RCS No. 6/2008 is

challenged in RCA No. 98/2013 and the suit property is the same, therefore, RCS No. 26/2014 be stayed, which is stayed till 07/09/2021. Principal District Judge, Amravati, dismissed appeal RCA No. 98 of 2013. Hence, Second Appeal No. 42 of 2022 is filed, wherein, this Hon'ble Court vide order dated 07/06/2022, issued notice with question of law. Petitioners-defendants in RCS No. 26/2014 filed an application under Order 14, Rule 5 of CPC for recasting the issue regarding ownership of suit house at Exh. 45.

6. By the impugned order Civil Judge Junior Division, Morshi, Dist. Amravati, rejected the applicant below Exh. 45 for recasting of the issue on the count that the issue of ownership is decided in RCS No. 6/2008, which in fact is sub-judiced in S.A. 42/2022 before this Court and also on the count that the order dated 30/01/2016, below Exh. 22 for deletion of issue No. 1 is not 1 challenged. The aforesaid order is the subject matter of challenge in the present writ petition.

7. Learned counsel for the petitioner contended that the learned Trial Court erred to considered that on basis of unregistered

document mutation cannot be effected, which is done so by changing the name of owner from Shirbhate to Baldeo Kashinath Mohod, who sold the suit house by registered sale deed dated 04/10/2007, resulting in the fact that Baldeo Mohod sold the suit house firstly by registered sale deed dated 08/10/1984 to Rambhau Fakirsa Shirbhate and again by registered sale deed dated 04/10/2007 to Taibai Kisanrao Ainar, the respondent-plaintiff. It is further contended that the learned Trial Court without considering the documents on record passed an impugned order which needs interference and needs to be set aside.

8. In spite of service none appeared for respondent. Heard learned counsel for the petitioners. The defendant/petitioner herein filed one application in RCS No. 26/2014, for grant of permission to amend the written statement. By way of this amendment defendants want to implead plea of *res judicata* and one correction in Clause - 12. The said application was opposed by the plaintiff. The defendant also moved an application under Order 14, Rule 5, at Exhibit 45 in RCS No. 26/2014, for recasting issues. The said application is also opposed by the plaintiff/respondent. It

is submitted by plaintiff in reply that on Exhibit 22, the said Court passed order on 30/01/2016, and the issue about title of the plaintiff was deleted, as defendant No. 2 in RCS No. 6/2008 Rambhau Fakirsa Shirbhate and another Vs. Baldev Kashinath Mohod and others, means a plaintiff in RCS No. 26/2014, is owner of suit property has purchased by her legally. In view of that it is submitted in reply that application is misconceived. The defendant applied under Order 14, Rule 5, on the ground that the issue of title is very much necessary. It is the contention of the plaintiff that the present suit is filed for possession of suit house, wherein, defendants appeared and contested the suit. The defendants objected title of the plaintiff over the suit house.

9. In RCS No. 6/2008, the Trial Court dismissed issue of title, First Appellate Court also dismissed. This Court passed order in Second Appeal bearing No. 42/2022, and restrained present plaintiff from taking possession of suit house without adopting due process of law till further orders. It is contended by the defendant-petitioner herein that their father purchased suit house in the year 1984, however, the said sale deed was not brought to the

knowledge of the Trial Court and First Appellate Court in RCS No. 6/2008. This fact is taken into consideration by this Court and restrained plaintiff from taking possession of suit property. In view of purchase of the suit property in the year 1984, plaintiff claiming to frame issue in respect of ownership.

10. As against this, respondents submission before the Trial Court that the said issue was already framed and subsequently deleted by order below Exhibit 22 dated 30/01/2016. The Court held specifically while deleting that in RCS No. 6/2008, question of ownership of plaintiff is already decided. Accordingly, issue No.1, pertaining to ownership was deleted. The learned Trial Court rejected the application on the ground that though defendant denied the title of plaintiff, however, in view of amendment dated 11/03/2016, he objected suit on account of decision in RCS No. 6/2008, regarding title. From this, the learned Trial Court observed that it clearly indicate that the defendants admitted decision on title in previous suit bearing No.6/2008. However, in my considered opinion, there was no necessity to deduce such inference, specifically when, it is the contention of the defendant that their

father purchased the suit house in the year 1984 and it was not brought to the knowledge of the Trial Court or First Appellate Court. Therefore, defendants filed Second Appeal, wherein, substantial question of law is framed and there is restraint on taking over possession without following due process of law. While rejecting the application, the learned Joint Civil Judge Junior Division, Morshi, failed to appreciate this fact that issue of title is not finally concluded and it is subject matter of Second Appeal.

11. By this petition, petitioner is also challenging order dated 30/01/2016, passed below Exhibit 22, in RCS No. 26/2014, at Annexure – 6, and the impugned order dated 21/11/2024, below Exhibit 45. It appears that the application filed by defendants present petitioners under Order 6, Rule 17, came to be allowed on 11/03/2016 and raised plea and on *res judicata*. However, after going through the contents, it appears that the said issue is not finally decided and issue about title of plaintiff is pending before this this Court in Second Appeal.

12. In view of that in my considered opinion, it is necessary

to frame issue of title in the present matter also. The order passed by learned Trial Court on the presumption that, issue is decided finally and therefore, there is no necessity to frame the same issue in the present suit does not sustain. It is yet to be finally concluded, as it is pending before this Court in Second Appeal. So far as prayer challenging the impugned order dated 30/01/2016, below Exhibit 22 is concerned, in view of the order passed on application under Order 14, Rule 5, which is unsustainable, this Order below Exhibit 22 is also required to be set aside. Accordingly, I proceed to pass the following order :

ORDER

- (i) The Writ Petition is allowed.
- (ii) The impugned order dated 30/01/2016, passed by Civil Judge Junior Division, Morshi, Dist. Amravati, below Exhibit 22 in RCS No. 26/2014 and impugned order dated 21/11/2024, passed by Joint Civil Judge Junior Division Morshi, Dist. Amravati, below Exhibit 45, in RCS No. 26/2014, are here by quashed and set aside.

(iii) Learned Trial Court is directed to frame issue in respect of ownership of plaintiff specifically when the defence of the defendant is that there was registered sale deed executed in favor of father of the petitioners/defendants and the said issue is pending in Second Appeal No. 42/2022.

The Writ Petition stands disposed of.

(Smt. M.S. Jawalkar, J.)

Jayashree..