

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7019 OF 2010

Tanaji Tukaram Jadhav

..petitioner.

Vs

Anandrao Bapu Ghate Jadhav
and Ors.

.. Respondents

Ms. Sujata S. Mogre, Advocate for Petitioner.

Mr. P. B. Gujar, Advocate for Respondents no.1, 2, 3A and 3B.

CORAM : R.G.KETKAR,J.

DATE : 03/07/2015

PC:

1. Heard Ms. Sujata Mogre, learned counsel for the petitioners and Mr. P.B.Gujar, learned counsel for respondents no.1, 2, 3A and 3B at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as original plaintiff, has challenged the Judgment and order dated 28.7.2010 passed by the learned Civil Judge, Jr. Dn., Wai below Exhibit 172 in Regular Darkhast No.2 of 1999. By that order, the learned trial Judge rejected the application filed by the plaintiff under Section 151 read with Order 20, Rule 18 of C.P.C. for passing final decree.

3. In support of this Petition, Ms. Mogre submitted that the learned trial Judge rejected the application only on the ground that for passing final decree, the plaintiff has to file separate application. Unless and until fresh application for passing final

decree is made, the plaintiff cannot claim passing of final decree. She submitted that in view of the decision of the Apex Court in the case of Shub Karan Bubna Vs. Sita Saran Bubna, (2009) 9 Supreme Court Cases 689, once a preliminary decree in partition suit is passed, the proceedings should be continued for fixing dates for further proceeding till a final decree is passed. It is the duty and function of the Court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution. She, therefore, submitted that the learned trial Judge was not justified in directing the plaintiff to file application for passing final decree.

4. On the other hand, Mr. Gujar submitted that the application made by the plaintiff under section 151 read with Order 20 Rule 18 itself is not maintainable. That apart, he submitted that Commissioner submitted reports at Exhibits 97 and 149. While opposing the application filed by the plaintiff at Exhibit 172, Judgment debtor specifically objected to the reports submitted by the Commissioner at Exhibits 97 and 149. Unless and until objections are decided, final decree cannot be passed. He also relied upon the decision of the Apex Court in the case of Shub Karan Bubna (supra).

5. I have considered the rival submissions made by the

learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned trial Judge rejected the application on the ground that the plaintiff has to file fresh application for passing final decree. Learned trial Judge has also not decided the objections to the reports submitted by the Commissioner. The Apex Court has observed in paragraph 31 as under.

“31. In so far final decree proceedings are concerned, we see no reason for even legislative intervention. As the provisions of the Code stand at present, initiation of final decree proceedings does not depend upon an application for final decree for initiation (unless the local amendments require the same). **As noticed above, the Code does not contemplate filing an application for final decree.** Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.”

6. In view thereof, the reasons given by the learned trial Judge that the plaintiff has to file application for passing preliminary decree cannot be sustained. I further hold that it is not necessary for the plaintiff to file application for passing final decree. In view thereof, the impugned order cannot be sustained and is liable to be set aside. At the same time, in the same judgment the Apex Court has observed thus :-

“The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard

to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the *proposals* contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared."

7. In view of the above extracted portion, proposals contained in the reports submitted by the Court Commissioner are required to be considered by the Court and after hearing objections to the reports, if any, Court has to pass final decree. In view thereof, the impugned order is set aside and the Petition is disposed of in the following terms:

- (i) It is held that it is not necessary for the plaintiff to file application for passing final decree.
- (ii) The Court shall consider the objections raised by the parties to the reports of the Commissioner at Exhibits 97 and 149 and thereafter proceed to pass a final decree.
- (iii) Rule is partly made absolute in the aforesaid terms with no order as to costs. Certified copy expedited.

(R.G.KETKAR, J.)