

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 32 OF 2016
WITH
CIVIL APPLICATION NO. 10898 OF 2016

MAROTI S/O. TUKARAM NILKANTHE (DIED) THR. L.Rs.
Vs.
KHANDERAO S/O. GOVINDRAO HATNURE AND ORS.

...
Advocate for petitioners : B.A. Dhengale
Advocate for respondent No. 1 : H.V. Patil
Advocate for respondent Nos. 2-A-1-i : S.P. Salgar
...

CORAM : T.V. NALAWADE, J.
DATED : 29th November, 2016.

ORDER :

1. The petition is filed to challenge the order made by the learned Civil Judge, Junior Division, Mukhed on Exh. 1 in Regular Darkhast No. 3/2015. Heard both the sides.

2. The execution proceeding is filed by present respondent Khanderao for getting execution of decree given in Special Civil Suit No. 26/1977. The suit was filed for relief of possession of two agricultural lands and the suit is decreed and the decree has become final. In execution proceeding, Khanderao has prayed for giving his $\frac{1}{2}$ share from the suit properties as the other decree holders are not coming to the Court for execution of the decree given in their favour. It is the

case of Khanderao that $\frac{1}{2}$ portion was given to him by the owner Vithabai, original plaintiff, under the will. This case of Khanderao was not disputed by the other legal heirs of Vithabai like her daughter Chandrabai and on that point also the decree is final.

3. The learned counsel for petitioner submitted that in the past, Darkhast No. 2/2002 was filed by Khanderao, but the said proceeding was dismissed as he had not joined other decree holders as party to the said proceeding. The learned counsel for petitioner submitted that appeal filed against the said order was also dismissed and that decision has also become final. He submitted that in spite of these circumstances, the new proceeding, executing proceeding is entertained by the Executing Court and that proceeding came to be filed in the year 2015. The learned counsel for petitioner submitted that the decision given in Special Civil Suit cannot be treated as final decision as the second appeal filed against said decision is still pending. However, submission made shows that second appeal was dismissed for default and only the application filed for restoration is pending. Admittedly, in the restoration proceeding, no stay is granted to the execution of the aforesaid decree.

4. The submissions made by the learned counsel for

petitioner show that the legal heirs of Chandrabai, daughter of Vithabai, have sold their share to the present petitioner and so, they are not coming to the Court for getting execution of the decree given in their favour. The learned counsel for petitioner submitted that in spite of these circumstances, the Executing Court has made order in favour of Khanderao and he has given choice to select the $\frac{1}{2}$ portion which can be carved out by the Court Commissioner for taking the possession of the said portion by executing the decree. The learned counsel submitted that in ordinary course, the properties need to be partitioned between the two legal heirs of Vithabai and it should be equitable partition and after that both the sides will have their say with regard to the partition which will be effected. He submitted that there is no reference of section 54 of Civil Procedure Code in the operative order made by the Executing Court, when the partition needs to be made in accordance with section 54 of Civil Procedure Code as the property needs to be partitioned between the two legal heirs of Vithabai.

5. The order made by the Executing Court shows that T.I.L.R. has to divide the property in to two portions and choice is given to decree holder Khanderao to get one of the two shares. It can be said that the T.I.L.R. will be making the partition,

division which will be equitable and in that case, there will not be any room to the judgment debtor, present petitioner to take objection, if $\frac{1}{2}$ portion which is carved out by T.I.L.R. is accepted by Khanderao. The operative part of the order shows that the T.I.L.R. is expected to prepare the map showing the divisions. In view of the provisions of Order 26, Rule 13 and 14, map will be considered by the Executing Court and only after that further orders will be made. That is the routine thing and at this stage, there is no reason for the present petitioner to apprehend that he may not get proper share which he has purchased from one legal heir of Vithabai. This Court holds that the present proceeding is premature as the Executing Court will have to follow the procedure like Order 26, Rule 13 and 14 of Civil Procedure Code. Thus, there are no merits in the present proceeding. The petition stands dismissed.

6. Civil Application filed for brining legal heirs is allowed. Those legal heirs are represented by Advocate Shri. H.V. Patil. Necessary amendment is to be shown in the petition.

[T.V. NALAWADE, J.]

SSC/