

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 669 OF 2016**

Shri Shashikant Babaso Barwade	Petitioner
Vs	
1(a) Shantaram Bharmu Barwade and Ors	.. Respondents

Mr. Shrikrishna R Ganbavale, Advocate for Petitioner.
Mr. Kedar P. Lad, Advocate for Respondents no.1(a) to 1(c).

CORAM : R.G.KETKAR,J.
DATE : 18/02/2016

PC:

1. Heard Mr. S.R.Ganbavale, learned counsel for the petitioner and Mr. Kedar P. Lad, learned counsel for the respondents no.1(a) to 1(c) at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 2.12.2014 passed by the learned Civil Judge, Jr. Dn., Kurundwad below Exh.88 in Final Decree Application No.2 of 2008. By that order, the learned trial Judge rejected the application made by the petitioner under Order I, Rule 10 of C.P.C for impleading him as a party in the Final Decree proceedings.
3. Respondent no.1-Shantaram Barwade had instituted suit for partition and separate possession. The suit was decreed on 21.7.1979. Respondent no.1(a) to 1(c) filed Final Decree Application No.2 of 2008 praying for effecting partition by metes and bounds and handing over their separate possession. During

the pendency of the final decree application, they took out application dated 25.4.2012 at Exh.60 for appointing Court Commissioner for effecting partition of house property, situate in CTS No.771 within the municipal limits of Kurundwad Municipal Council, Tq. Shirola, Dist. Kolhapur on the ground that work of partition is incomplete. By order dated 5.9. 2012, the learned trial Judge appointed Advocate Shri R.J.Gourwade as Court Commissioner for suggesting the partition. The learned trial Judge further directed the Court Commissioner to issue notice of commission to defendant no.1/judgment debtor no.1 along with other parties as per respective addresses.

4. In pursuance of that order, the Court Commissioner submitted report dated 30.1.2013. In paragraph 9 of that report, the Court Commissioner submitted that when he went to execute commission work, the petitioner raised objections and consequently he could not suggest partition by metes and bounds. He, therefore, solicited guidance in that regard.

5. Respondent no.1(a) to 1(c) filed application under Order 21 Rule 97 on 19.3.2013 at Ex.67. Respondents no.1(a) to 1(c) prayed for orders directing the petitioner not to cause any obstruction to the work of commissioner. On the same day, the learned trial Judge issued notice to the petitioner for filing say, returnable on 18.4.2013. The petitioner filed reply dated 5.7.2013 raising various objections including objection on the

ground of maintainability of such application in final decree proceedings.

6. By judgment and order dated 8.7.2013, the learned trial Judge allowed the application and prohibited the petitioner from causing obstruction while effecting partition as per the decree passed in respect of survey no.771 in any manner in whosoever. The trial Judge directed the Commissioner to complete commission work and submit report forthwith.

7. The petitioner thereafter filed application dated 20.9.2014 under Order I, Rule 10 of C.P.C. for impleading him as party in the Final Decree proceedings. Respondents 1(a) to 1(c) filed reply dated 4.10.2014 opposing the application. By the impugned order, the learned trial Judge rejected the application. It is against this decision, the petitioner has instituted the present petition.

8. Mr. Ganbavale submitted that by order dated 8.7.2014, the learned trial Judge prohibited the petitioner from causing obstruction in any manner whatsoever to the proposed partition of City Survey No.771 while executing the decree. However, the petitioner is not made a party in the final decree proceedings. Unless and until the petitioner is made party, no direction can be issued against him. Apart from that, he submitted that basically the application made by respondent 1(a) to 1(c) under Order XXI, Rule 97 itself was wholly misconceived and is not maintainable.

He submitted that it is only final decree proceedings are disposed of and the obstruction is caused by any person, decree holder is entitled to file application under Order XXI, Rule 97. In other words, so long as the final decree proceedings are pending, decree holder cannot file application under Order XXI, Rule 97. He submitted that the petitioner has purchased the property from one Mr. Ajit Patil to whom share in the property was sold in the year 2003. In other words, the petitioner is claiming independent right, title and interest in City Survey No.771. In support of his submissions, he relied upon the following decisions:

1. Hasham Abbas Sayyad Vs Usman Abbas sayyad, (2007) 2 SCC 355 and in particular paragraphs 3,7 and 8;
 2. Ganduri Koteshwaramma Vs. Chakiri Yanadi, (2011) 9 SCC 788 and in particular paragraphs 14, 19, 20 and 21.
 3. Anant Ambaji Gite since deceased, by his heirs Vs. Dnyaneshwar Shankar Gite, 1998 (4) Bom C.R.675 and in particular paragraph 3 thereof;
 4. Smt. Rukmani w/o Late Ethiraj, Sri .. Vs. Uday Kumar, ILR 2008 Karnataka 13 and in particular para 3 thereof.
9. On the other hand, Mr. Lad supported the impugned order. He submitted that on the application Exh.67, the learned trial Judge issued notice to the petitioner. In pursuance thereof, the petitioner filed reply and after hearing both sides, the learned trial Judge allowed the application Exh.67 on 8.7.2014. It is only

thereafter the petitioner made application on 20.9.2014 at Exh-88 under Order I, Rule 10 of C.P.C. He submitted that as the claim made by the petitioner was already adjudicated by the learned trial Judge on 8.7.2014, he cannot be impleaded as party in the final decree proceedings.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that Regular Civil Suit No.17 of 1973 was instituted for partition and possession. Suit was decreed and that decree had attained finality. Respondent no.1-Shantaram had filed final decree proceedings for execution of the decree passed in suit for partition. During the pendency of the proceedings, Commissioner was appointed for effecting the partition of the house property. When the Commissioner went for carrying out commission work, the petitioner obstructed. To that effect, the Court Commissioner submitted report dated 30.1.2013. It is at that stage respondents no.1(a) to 1(c) made application under Order XXI, Rule 97. Mr. Ganbavale submitted that the application under Order XXI, Rule 97 itself was wholly misconceived and is not maintainable. I do not find any merit in the submission. The execution proceedings in suit for partition come to an end only after property is divided by metes and bounds and their respective sharers are actually put in physical possession of the respective shares. In the present case, it is not

in dispute that preliminary decree of partition is passed determining shares of the parties. Respondents no.1(a) to 1(c), therefore, filed final decree proceedings for effecting partition by metes and bound and put them and other co-sharers in possession of their respective shares. In other words, the execution proceedings are still pending and are not yet over. It is at the time of carrying out work of commission, the petitioner raised objection as is evident from the report submitted by the Court Commissioner. In view thereof, it cannot be said that the application under Order XXI, Rule 97 made by respondents no.1(a) to 1(c) is not maintainable. Mr. Ganbavale relied upon the the aforesaid decisions. However, he could not point out that any such proposition is laid down in these judgments. Reliance placed by Mr. Ganbavle on these decisions, therefore, does not advance the case of the petitioner.

11. As far as the order impugned in the present petition rejecting the application made by the petitioner under Order 1 Rule 10 is concerned, I do not find that the learned trial Judge has committed any error. On the other, under Order XXI, Rule 97 at Exh.67 the learned trial Judge has issued notice to the petitioner. In pursuance thereof, the petitioner filed reply and after considering the case made out by the parties, the learned trial Judge allowed the application. It is thereafter the present application is filed under Order I Rule 10 C.P.C. For the reasons

recorded in paragraphs 7 to 9, I do not find that the learned trial Judge has committed any error while passing the impugned order. Hence, Petition fails and the same decree.

(R.G.KETKAR, J.)