

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7338 OF 2015

Songya Ganpat Tare ... Petitioner
Vs.
Balaram Shripat Tare and others ... Respondents

Mr. J. M. Puranik for Petitioner.
Mr. Amol P. Mhatre for Respondents No.1 to 9.
Ms Vrushali Nimbalkar, AGP for Respondents No.10 to 12.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 15 & 16, 2016

P.C. :

Heard Mr. Puranik, learned Counsel for petitioner and Mr. Mhatre, learned Counsel for respondents No.1 to 9 and Ms Nimbalkar, learned AGP for respondents No.10 to 12 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 16.05.2015 passed by the learned Civil Judge, Junior Division, Bhiwandi below exhibit-109 in Regular Darkhast No.44 of 2002. By that order, the learned trial Judge rejected the application made by the petitioner for deciding the maintainability of application exhibit-99 and prayer for stay of Darkhast under Order XXI, Rule 26 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). The relevant and material facts for disposal of this Petition, briefly stated, are as under:

3. Regular Civil Suit No.420 of 1983 was instituted by one Krishna Ganpat Tare against Songya Ganpat Tare and the respondents herein. In that Suit, legal representatives of Sripat and Shantaram were also made parties as defendants No.2 to 3. The Suit was for partition and separate possession of the joint family property. On 17.08.1994, the Suit was

decreed. It was held that Ganpat is entitled to $1/3^{\text{rd}}$ share; Shantaram is entitled to $1/3^{\text{rd}}$ share and Sripat is entitled to $1/3^{\text{rd}}$ share. The learned trial Judge also held that the petitioner, hereinafter referred to as defendant No.1, and plaintiff No.2 (sister of petitioner) as also Krishna (original plaintiff) have $1/9^{\text{th}}$ share each. Aggrieved by this decision, defendant No.1 preferred Appeal No.465 of 1994. Appeal was dismissed on 29.10.2001. The order passed by the appellate Court is not challenged. In other words, the orders passed by the Courts below attained finality.

4. The decree-holder Krishna filed Darkhast No.44 of 2002. Judgment-debtors No.2 to 6/3 i.e. respondents made application exhibit-99 for demarcation and division of their shares. Decree-holder Krishna did not object to the said application. It is the case of the judgment-debtors No.2 to 6/3 that the said application was not opposed by judgment-debtor No.1 / defendant No.1. On 29.03.2014, the application was allowed by the executing Court. On the same day, the executing Court addressed a communication to the Collector, exhibit-100, for filing appropriate report. On 10.02.2015, judgment-debtors No.2 to 6/3 made application for grant of police help / police protection for carrying out measurements of the joint family properties. Judgment debtor No.1 obstructed the officers. On 16.05.2015, the application filed by the judgment-debtors No.2 to 6/3 at exhibit 102 for police protection was allowed. Judgment debtor No.1 filed application dated 23.03.2015, exhibit-109 for maintainability of the application filed by the judgment-debtors No.2 to 6/3 and for stay of execution proceedings. By the impugned order dated 16.05.2015, the learned trial Judge rejected the application made by the judgment-debtor No.1. It is against this order, the judgment-debtor No.1 has instituted the present Petition.

5. Mr. Puranik submitted that perusal of the decree dated 17.08.1994 passed by the trial Court shows that only the shares of decree-holders (respondents No.8 and 9 herein) were determined. Shares of judgment-debtors No.2 to 6/3 were not determined. He further submitted that judgment-debtors No.2 to 6/3 took out application dated 14.03.2014, exhibit-99, for giving possession of their 5/29th share. The application was allowed on 24.03.2014. Judgment debtor No.1 was not served with the copy of that application. The decree-holders colluded with other judgment debtors and gave no objection to the application exhibit-99. In short, he submitted that judgment debtor No.1 was not given fair and reasonable opportunity to contest exhibit-99. Order dated 24.03.2014 below exhibit-99 was passed behind the back of the judgment debtor No.1. Judgment debtor No.1, therefore, filed application exhibit-109 for deciding the maintainability of proceeding instituted by judgment debtors No.2 to 6/3 and for further staying the proceedings of Darkhast.

6. Mr. Puranik invited my attention to paragraph 13 of the judgment and order dated 17.08.1994, wherein it was observed thus,

“13. ... However, possibility cannot be ruled out that partition might have taken place among the father of the plaintiffs Ganpat and uncles of plaintiff named Sripat and Shantaram. Because, the defendant No.3, 4 and 6 were the heirs of Shantaram and Sripat, who have conceded that partition took place between them some long back. Moreover, the defendant No.2 to 7 have not claimed their share in the suit property, on the contrary admitted the contention of the defendant No.1. Therefore, I have no hesitation to infer that partition took place between Ganpat, Sripat and Shantaram and Ziprya Tare. No doubt, there is no specific share entered into or determined in the Revenue Record in respect of the lands allotted to the share of Ziprya, Ganpat, Shantaram and Sripat, but in partition it is not required that lands should be actually divided. It is sufficient that the share should be determined, because the defendant No.2 to 7 themselves admitted partition and they have not claimed their share in the suit properties.”

7. He also invited my attention to paragraph 4 of the District Court's

judgment and order dated 29.10.2003, which is to the following effect:

“4. Defendant Nos. 3, 4 and 6 have filed their W.S. at Exh.61. They have also supported the theory of partition before about 18 years as contended by defendant No.1. Thus, they have supported defendant No.1 and prayed to dismiss the suit.”

8. For all these reasons, he stated that impugned order is liable to be set aside thereby giving opportunity to the judgment debtor No.1 to contest application exhibit-99.

9. On the other hand, Mr. Mhatre supported the impugned order. He submitted that in a Suit for partition, defendants are also plaintiffs. That apart, while answering issues No.6 and 7, the learned trial Judge in his judgment and order dated 17.08.1994 determined the shares of the plaintiff and defendant No.1. He, therefore, submitted that the learned trial Judge rightly rejected the application. That apart, judgment debtor No.1 has not shown that any prejudice is caused to him by not serving application exhibit-99. He has taken me though paragraph 14 of the trial Court's order.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question is whether while deciding the Suit for partition on 17.08.1994, the learned trial Judge had determined the shares of plaintiff and defendant No.1. Paragraph 18 of that order, reads as under:

“18. Plaintiffs have claimed their 1/3rd share each in the Suit properties. But I fell to understand how the Plaintiffs claimed their 1/3rd share each. Because, the Suit properties were belonging to Ziprya, Ziprya was having three sons, named as Ganpat, Sripat and Shantaram. Consequently, Ganpat was having 1/4th share, Sripat was having 1/4th share and Shantaram was having 1/4th share, while the said

Ziprya was having $\frac{1}{4}^{\text{th}}$ share, after the death of said Ziprya his $\frac{1}{4}^{\text{th}}$ share would devolve on Ganpat, Sripat and Shantaram. Consequently, the share of Ganpat would be $\frac{1}{3}^{\text{rd}}$, share of Sripat would be $\frac{1}{3}^{\text{rd}}$ and of Shantaram would be $\frac{1}{3}^{\text{rd}}$. Ganpat died leaving behind him, the Plaintiff No.1 and defendant No.1 as his sons while Plaintiff No.2 as his daughter. Therefore, the Plaintiff No.1 and defendant No.1 are entitled to get $\frac{1}{9}^{\text{th}}$ share each and Ganpat was having $\frac{1}{9}^{\text{th}}$ share. After the death of Ganpat his $\frac{1}{9}^{\text{th}}$ share would devolve on Plaintiff No.1, defendant No.1 and Plaintiff No.2 equally being Class-I heirs. Consequently, the share of Pltff. No.1 would be $\frac{1}{9} + \frac{1}{27} = \frac{4}{27}$ while the share of the defendant No.1 would be alike $\frac{1}{9} + \frac{1}{27} = \frac{4}{27}$ and the share of the Plaintiff No.2 would be such as $\frac{1}{27}$. Thus, the Plaintiff No.1 and 2 together would succeed $\frac{4}{27} + \frac{1}{27} = \frac{5}{27}$. Hence, I hold that the Plaintiffs are entitled to get their $\frac{5}{27}^{\text{th}}$ share in the suit properties as mentioned in para No.4(a)(b) & (c) of the plaint.”

11. Perusal of this paragraph clearly shows that the learned trial Judge observed that the suit properties were originally belonging to one Ziprya. Ziprya had three sons, namely, Ganpat, Sripat and Shantaram. Consequently, Ziprya, Ganpat, Sripat and Shantaram had $\frac{1}{4}^{\text{th}}$ share each. After the death of Ziprya, his $\frac{1}{4}^{\text{th}}$ share would devolve on Ganpat, Sripat and Shantaram. The share of Ganpat would be $\frac{1}{3}^{\text{rd}}$, the share of Sripat would be $\frac{1}{3}^{\text{rd}}$ and of Shantaram would be $\frac{1}{3}^{\text{rd}}$. Ganpat died leaving behind him plaintiff No.1 and defendant No.1 as his sons while plaintiff No.2 as his daughter. In view thereof, plaintiff No.1 and defendant No.1 are entitled to get $\frac{1}{9}^{\text{th}}$ share each and Ganpat would get $\frac{1}{9}^{\text{th}}$ share. After the death of Ganpat, his $\frac{1}{9}^{\text{th}}$ share would devolve on plaintiff No.1, defendant No.1 and plaintiff No.2 equally being Class-I heirs. Consequently, the share of plaintiff No.1 would be $\frac{4}{27}$ and share of defendant No.1 would be $\frac{4}{27}$ and share of plaintiff No.2 would be $\frac{1}{27}$. Thus, plaintiffs No.1 and 2 together would get $\frac{5}{27}^{\text{th}}$ share ($\frac{4}{27} + \frac{1}{27}$). Accordingly, the learned trial Judge held that plaintiffs are entitled to get their $\frac{5}{27}^{\text{th}}$ share in the suit properties.

12. It is no doubt true that clause 2 of the operative part of the order declared that plaintiffs are having 5/27th share in the suit properties described in paragraphs 4(a), (b) and (c) of the plaint. It is, however, no disputed that judgment debtors No.2 to 6/3 are legal representatives of Sripat and Shantaram. Naturally, the share of Sripat and Shantaram will devolve upon judgment debtors No.2 to 6/3. Judgment debtors No.2 to 6/3 filed application exhibit-99 claiming share of 9/27 and separate possession of this share. Mr. Mhatre accepted that copy of the application Exhibit-99 was not served on judgment debtor No.1 i.e. the present petitioner.

13. The submission of Mr. Puranik is two-fold, firstly, the learned trial Judge determined the shares of only plaintiffs as 5/27. In view of the categorical finding recorded by the learned trial Judge in paragraph 18 of order dated 17.08.1994, it is not possible to accept the submission of Mr. Puranik that shares of Sripat and Shantaram were not determined. That apart, the Suit was for partition and separate possession. In such a Suit, all the defendants are also plaintiffs. I, therefore, do not find any merit in the submission of Mr. Puranik that the trial Court determined shares of only plaintiffs as reflected in clause 2 of the operative part of the order. Secondly, submission of Mr. Puranik is that copy of the application exhibit-99 was not served on the judgment debtor No.1 and that he was not given fair and reasonable opportunity to contest exhibit-99. The contention of judgment debtor No.1 that he was not served with the application exhibit-99 is not disputed by Mr. Mhatre. He further submitted that judgment debtor No.1 has not shown that any prejudice is caused to him. I find merit in the submission of Mr. Mhatre that once the shares are determined by the trial Court and the said decree is confirmed by the appellate Court, which has attained finality, it is no longer open to either of the parties to reopen the issues as to whether the

shares are determined or not. The learned trial Judge has determined the shares as is evident from paragraph 18 of the trial Court's order. Understood thus, no prejudice is caused to the judgment debtor No.1 by not serving copy of the application exhibit-99. Even otherwise, Mr. Puranik was not in a position to point out as to what difference it would have made to the case of judgment debtor No.1, had it been served with the copy of application exhibit-99. The learned trial Judge while rejecting the application has observed in paragraph 14 that the learned trial Judge while decreeing the Suit adjudicated the rights of the parties, namely shares of all the parties. It was further observed that it is settled law that in a partition Suit, the plaintiffs as well as all the defendants are plaintiffs for the said purpose. It is further observed that judgment debtors did not prefer Second Appeal and the shares of the parties are not yet set aside. Once the shares are decided then what remains is only to separate their shares by appropriate procedure. Application made by judgment debtor No.1 at exhibit-109 for deciding the maintainability of application, therefore, is without any merit. The learned trial Judge rightly held that application exhibit-99 made by judgment debtors No.2 to 6/3 is perfectly maintainable and that, there is no question of staying the proceedings of Darkhast.

14. The learned trial Judge also recorded that Rule 26 of Order XXI of C.P.C. lays down that the executing Court can grant stay upon sufficient cause being shown. In the present case, judgment debtor No.1 has applied for stay on the ground that till the decision on application below exhibit-109 as regards maintainability of application exhibit-99 is decided. The learned trial Judge has held that application exhibit-99 is perfectly maintainable and therefore, application exhibit-109 filed by the judgment-debtor No.1 is not maintainable. In view thereof, question of staying further proceedings does not arise. After considering the

material on record, I do not find that the learned trial Judge has committed any error. Mr. Puranik was not in a position to demonstrate that the findings recorded by the learned trial Judge are perverse being based upon no evidence or that they are contrary to evidence on record. Merely because another view of the matter is possible, that by itself, is not sufficient for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is rejected.

(R. G. KETKAR, J.)

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