

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

WRIT PETITION NO. 8029 OF 2015

Balaso Maruti Ladgaonkar	 Petitioner
V/s.	
Raghunath Maruti Ladgaonkar & Ors.	 Respondents

Mr. Drupad Patil for the Petitioner.

**CORAM : K. K. TATED, J.
DATED : 08/07/2016**

PC.:

. Heard learned Counsel for the petitioner.

2 By this petition under Article 227 of the Constitution of India, the petitioner defendant no.3 challenges the order dated 17.04.2015 passed by Civil Judge, Junior Division, Panhala below Exh. 49 in final Decree No. 3 of 2006 rejecting the defendant No.3's application for considering the following points:

“A) City Survey No. 477 is not yet divided between applicant and opponents. This fact has been suppressed by the applicant from the court.

B) Court Commissioner has given report that division of C.S. No.477, by mets and bounds, is not possible.

C) Decree in RCS No. 293/2000 has been passed by this Court without jurisdiction and hence it is invalid.

D) Deceased Martuti Rama Ladgonkar had bequeathed his share to opponent No.1 by will dated 29.03.2003 and said will has not been considered by this Court while deciding RCS No. 293/2000.

E) Opponent No.1 by obtaining loan has made construction in the suit property. Hence, if the applicant is claiming share in the suit property, he is equally liable to pay the loan amount proportionately.”

3 In the present proceeding, initially the respondent plaintiff filed Regular Civil Suit No. 239 of 2000 for partition and perpetual injunction. That suit was decreed by Civil Judge, Junior Division, Panhala Dist. Kolhapur on 21.03.2006 declaring the plaintiff's and defendant's share in HUF property. The operative part of the said judgment reads thus:

“ ORDER

1. *Suit is partly decreed with costs.*
2. *Plaintiff, defendant No.3 and defendant No.4 are having 5/16th share each and Defendant No.5 is having 1/16th share in the suit properties except G.P.M.No. 508's property. Plaintiff, defendant No.3 and defendant No.4 are having 5/48th each share and defendant No.5 is having 1/48th share in the G.P.M. No. 508's property.*
3. *Court-commissioner be appointed for doing partition of house property.*
4. *As per Section 54 of the C.P.C. decree be sent to Collector, Kolhapur for doing the partition and separate possession of the suit properties.*
5. *Separate inquiry be held for deciding mesne profit as per Order 20 Rule 12 of the C.P.C.*
6. *Prayer of perpetual injunction is hereby rejected.*
7. *Preliminary decree be drawn up accordingly.”*

4 Thereafter, the defendant no.3 preferred Regular Civil Appeal No. 143 of 2006 in the District Court, Kolhapur. That appeal was rejected on 27.01.2009 by the District Judge-4, Kolhapur.

5 Being aggrieved by the decree passed by the Appellate Court, defendant no.3 preferred Second Appeal No. 30 of 2010 with Civil Application No. 1229 of 2009 in this Court. That Civil Application as well as Second Appeal stands dismissed by order dated 30.07.2013 passed by this Court (Coram : R.M. Savant, J). Being aggrieved by order passed by this court in Second Appeal No. 30 of 2010, the defendant No.3 preferred Special Leave Petition in the Apex Court. The Apex Court by order dated 20.01.2014 dismissed the SLP with liberty to make appropriate application before the Executing Court for allotting constructed portion of the suit premises in his favour.

6 Thereafter, the defendant no.3 preferred present application below Exh. 49 in Final Decree No. 3 of 2006. The Executing Court considering the evidence on record, rejected the application below Exh.49 in Final decree No. 3 of 2006. Hence, the present Writ Petition.

7 The learned Counsel for the defendant no.3 submits that Executing Court erred in coming to the conclusion that decree as it is filed can be executed according to law. He submits that in the decree passed by the Trial Court, the Trial Court failed to describe the share of some of the defendants. Hence, defendant no.3 preferred an application below Exh. 49 before the Executing Court. On the basis of these submissions learned Counsel for the defendant no.3 submits that this Hon'ble Court be pleased to set aside the order dated 17.04.2015 passed by the Civil Judge, Junior

Division, Panhala below Exh. 49 in Final Decree No. 3 of 2006 and direct the Executing Court to consider his application on its own merits.

9 I heard learned Counsel for the petitioner at length. It is to be noted that in the present proceeding, the Judgment and Decree passed by the Trial Court on 21.03.2006 was confirmed by the Appellate Court and thereafter, the Apex Court. The Trial Court in its Judgment and Decree dated 21.03.2006 held that plaintiff and some of the defendants were only entitled to share in the suit property. It shows that Trial Court has not allowed any share to the remaining defendants and same order was confirmed by the Appellate Court. The defendant No.3 by application below Exh.49 cannot open the entire issue again in the Executing Court. It is well settled law that the executing court cannot go beyond the decree.

10 Considering this fact, I do not find any substance in the present Writ Petition.

11 Hence, Writ Petition stands rejected.

(K.K.TATED, J.)