

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5737 OF 2014

Rashid Kha S/o. Abdul Razzak Khan

.... **PETITIONER.**

// **VERSUS** //

Bashira Khatun W/o. Hakam Ali Kha
(now deceased) through LRs.
and others.

.... **RESPONDENTS.**

Shri A.VBhide, Advocate for Petitioner.
Shri G.G.Mishra, Advocate for Respondent Nos. 22 to 25 and 28 to 30.
Ms S.W. Deshpande, Advocate for Respondent No. 26-A.

CORAM : Z.A.HAQ, J.
DATED : AUGUST 08, 2016.

ORAL ORDER :

1. Heard learned advocates for the respective parties.
2. This petition arises out of the order passed by the executing Court, partly rejecting the claim of the petitioner/ Judgment Debtor-2 for recalling the precept issued in respect of the agricultural land. The claim of the petitioner/ Judgment Debtor No.2 is that the decree passed by the trial

Court records that the agricultural land cannot be partitioned as the partition of the plaintiff's share would create fragment and therefore, the decree should be sent to the Collector for determination of the price of the plaintiff's share, so that the amount can be paid to the plaintiff. The decree further records that the share of the plaintiff in the house property is also negligible and it is also not practicable to partition the house property, and the Commissioner be appointed to workout the 3/44th share of the plaintiff. In the execution proceedings precept is sent to the Collector for working out the share as per the decree. The petitioner filed application (Exh.93) raising various objections and praying that the precept be called back. After considering the objections raised by the petitioner and the contentions of the other side, the executing Court, by the impugned order, directed that the Collector Buldana and Naib Tahsildar, Jalgaon Jamod should not proceed as per the precept sent on 5th August, 2011, so far as it relates to the house property. The claim of the petitioner that the agricultural land cannot be divided and only the value of share of the plaintiff is required to be determined, is not considered by the Executing Court and therefore the petitioner has approached this Court.

There are 44 respondents in the petition. The respondent No.26 is reported to be dead and Civil Application No. 1282 of 2015 is filed for bringing legal representatives of the respondent No.26 on record. Some of the legal representatives are served, however, some are unserved. Civil

Application No. 1283 of 2015 is filed seeking permission to supply correct addresses of respondent Nos. 6, 8, 10, 15, 31 and 43. Civil Application No. 1694 of 2016 is filed seeking permission to supply correct addresses of the respondent Nos. 32 and 44. This matter was listed in order matters on 2nd August, 2016 for consideration of Civil Applications. Shri G.G. Mishra, advocate submitted that the civil suit was filed in 1977 and the decree was passed by the District Court on 15th April, 1995 and the execution proceedings are pending since 2006 and the petitioner/ defendant No.2 being in possession of more property than his share determined by the Court, is prolonging the matter.

Considering the submissions made by Shri G.G. Mishra, advocate, it was proposed that the petition be listed for hearing on admission and at the time of hearing on admission it would be considered whether the unserved respondents and the proposed legal representatives are to be served. Accordingly, the petition is listed for admission. The learned advocates are heard.

I find that the interests of all the parties to the petition are protected either by the submissions made on behalf of the petitioner or the submissions made on behalf of the respondent Nos. 22 to 25 and 28 to 30. Considering the facts, I propose to dispose the petition.

The trial Court, by the judgment dated 31st December, 1984 concluded that the plaintiff is entitled for 3/44th share in the field property as well as in the house property, however, as the trial Court found that the share of the plaintiff in the house property was negligible and its partition was not practicable, the claim of the plaintiff in respect of the house property was dismissed. The trial Court recorded that the share of the plaintiff in the agricultural land, if allowed would create fragment and therefore, directed that the decree be sent to the Collector for determination of price of share of the plaintiff, so that it can be paid by the defendant No.1 to the plaintiff.

The plaintiff filed appeal before the District Court and by the judgment dated 15th April, 1995, the decree passed by the trial Court is modified. The District Court upheld the claim of the plaintiff for 3/44th share in the house property and directed that Commissioner be appointed to workout the share. The District Court maintained the judgment and decree passed by the trial Court regarding the entitlement of the plaintiff for 3/44th share in the field property and for determination of the price by the Collector.

4. The communication sent to the Collector, Buldana on 5th August, 2011 directs an enquiry for dividing the properties as per the decree and allotting separate shares. Considering the decree passed by the Court, the directions in the communication are not sustainable. The executing Court has directed the Collector, Buldana and Naib Tahsildar, Jalgaon Jamod not to

proceed as per the directions so far as they relate to the house property. However, the executing Court has committed an error in not recalling the communication in its entirety as the directions for partitioning the agricultural land are also not in consonance with the decree passed by the Court.

5. Shri G.G. Mishra, advocate has submitted that the executing Court becomes *functus officio* once the precept is issued and it has no power and jurisdiction to recall the precept. To support the submission, the learned advocate has relied on the judgment given in the case of *Keshao Raghunath Deosant and others. Vs. Waman Keshao Deosant and another*, reported in **AIR 1971 Bombay 26**. Considering the patent error committed by the executing Court while issuing the communication, in my view, the executing Court can rectify its error resorting to its inherent jurisdiction under Section 151 of the Code of Civil Procedure.

The submission made by Shri G.G. Mishra, advocate cannot be accepted for another reason. The respondent Nos. 22 to 25 and 28 to 30 have not challenged the directions given by the executing Court to the Collector and the Naib Tahsildar that they should take action as per the communication.

6. In the circumstances, the following order is passed :

- i) The impugned order is modified.
- ii) The application (Exh.93) filed by the petitioner is restored.
- iii) The executing Court shall decide application (Exh.93) afresh after hearing the parties.
- iv) The petitioner/ Judgment Debtor No.2 raised objection in the application (Exh.93) on the basis of the relinquishment deeds which objection is not adverted to by the executing Court while passing the impugned order. The executing Court shall consider all the objections raised by the petitioner/ Judgment Debtor No.2 in the application (Exh.93).
- v) As the proceedings are very old, the executing Court shall take up the proceedings with priority and dispose the proceedings within six months.

The petition is disposed in the above terms. The parties to bear their own costs.

CIVIL APPLN. NOS.1281/15, 1282/15, 1283/15, 2191/15 AND 1694/16.

In view of disposal of the petition, the applications for condonation of delay in bringing the legal representatives of deceased respondent No.26 on record, application for bringing legal representatives of deceased respondent No.26 on record, application seeking amendment of

cause title and for supplying correct addresses of respondent Nos. 6, 8, 10, 15, 31 and 43, application for amendment of the petition and application seeking correction of addresses of the respondent Nos. 32 and 44, respectively, are disposed of.

JUDGE

RRaut..

CERTIFICATE

I certify that this order uploaded is a true and correct copy of original signed order.

Uploaded by : R.B. Raut, PS

Uploaded on : 31/08/2016.