

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6618 OF 2014

SIKANDARKAN SULEMANKAN JAHAGIRDAR (DIED)
AND OTHERS
VERSUS
ISMAILKHAN SULTANKHAN JAHAGIRDAR (DIED)
AND OTHERS

Advocate for Petitioners : Shri Y.V. Kakade.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 15th June, 2017

PER COURT :-

1. The petitioners are aggrieved by the order dated 11/06/2014, by which, application Exhibit 81, seeking a direction to the Court Commissioner to submit his report in Regular Darkhast No. 23/2009, has been disposed of by issuing a direction that the decree in question is not executable.

2. Some of the respondents have been served by Court notice. They have not entered an appearance either through an advocate or in person. Respondent No. 1-J has been served by

paper publication and yet no appearance has been entered. Respondent Nos. 4 and 5, though have appeared through an advocate, are absent.

3. This matter was heard on 08/06/2017, and reserved for passing orders. However, since it was desirable that some more information be elicited from the petitioners, the matter was again placed on board today. Though the matter has been shown on board, none appeared from respondent Nos. 4 and 5, as well as all other respondents who have been served by Court notice as well as by paper publication.

4. I have considered the submissions of Shri Kakde, learned advocate on behalf of the petitioners.

5. It is undisputed that R.C.S. No. 175/1985, filed by the petitioners, claiming partition and possession with reference to the suit property described in the claim, was decided by judgment and order dated 26/08/1997. The order passed in the said judgment reads as under:

“Plaintiffs’ suit is decreed with costs.

It is hereby declared that the plaintiffs and defendant No.4 to 6 have $\frac{1}{2}$ share in the suit property specifically described in para No. 1A and 1B of the plaint.

Commissioner be appointed in execution, for effecting partition of the suit property by metes and bounds. Plaintiffs’ possession on eastern portion of the suit property be taken into consideration while delivery of plaintiffs’ share to them.

Defendant No. 1 to 3 are hereby perpetually restrained from alienation the suit property to anybody in any manner.

Decree be drawn up accordingly.”

6. The petitioners preferred R.D. No. 23/2009, seeking implementations of the directions issued by the Trial Court. It is categorically stated and it is also revealed from the record that earlier, the executing Court appointed advocate Shri Galande, as the Court Commissioner. Thereafter, advocate Shri T.S. Pathan, has been appointed, instead of advocate Shri Galande. The executing Court issued specific directions to the

Court Commissioner to effect the partition, by following the due procedure laid down in law and by keeping in view the directions of the Trial Court, reproduced above.

7. By the order dated 08/07/2011, the executing Court precluded the Court Commissioner from carrying out further partition, in the light of Writ Petition No. 2677/2011 pending before this Court. The said petition has been disposed of by order dated 08/02/2012.

8. The petitioners, therefore, made an application Exhibit 81, before the executing Court, praying that the Court Commissioner may be directed to implement the directions and submit the report. It was pointed out that the Court Commissioner had completed the process, but had not yet submitted his report. The judgment debtors had not appeared before the executing Court.

9. By order dated 13/02/2014, the executing Court directed the decree holders i.e. the petitioners, to address the Court on

the following two issues:

(1) “Whether decree passed in R.C.S. No. 175/1985, is executable in the present petition?

(2) The Decree Holders argue on aforesaid point on next fixed date without any failure.”

10. By the impugned order dated 11/06/2014, the executing Court concluded that the decree holders are putting a preliminary decree for execution, which is not permissible in law.

11. The executing Court has probably swayed and misdirected itself by considering the final prayer of the petitioners which is mentioned in column ‘10’ in the execution petition, which was filed in a tabular form, as per Rule 21 of the Order XXII of the C.P.C. It appears that the executing Court felt that the judgment of the Trial Court, which is undoubtedly a preliminary decree, is being put into execution straight away.

12. I find that the executing Court has misdirected itself. The

Trial Court had directed the procedure to be followed in the matter of allotting the share by metes and bounds, since it is an immovable property i.e. a house. So also, the executing Court in its impugned order, has failed to record that if the petitioners had erroneously filed the proceedings, what was the prescribed procedure to be followed for converting the preliminary decree into a final decree. It is trite law that the executing court cannot travel beyond the decree.

13. Learned counsel for the petitioner has supported his contention that the procedure to be followed for converting a preliminary decree into a final decree, by the judgment of the Hon'ble Supreme Court in the matter of *Bikoba Deora Gaikwad Versus Hirabai Marutirao Ghorgare* (2008, AIR SCW 4264). The observations of the Hon'ble Apex Court in paragraph Nos. 7, 10, 12, 13 and 14 read as under :

7. By the judgment and order dated 27-6-1975 passed by the Civil Judge, Junior Division, Indapur on the basis whereof the decree was prepared, 1/3rd share of the plaintiff as well as Defendant Nos. 1 and 2 were declared. In terms of the said decree, the plaintiff was granted

liberty to recover separate possession of the land excluding the lands which were in the possession of Defendant No.7 and of the suit property. It was directed that the partition of the land shall be effected by the Collector in the execution proceedings in terms of Section 54 of the Code. However, as regards partition of the house property, the same was to be effected by a Commissioner to be appointed in the execution proceedings. A bare perusal of the the said judgment clearly shows that the decree passed therein was a preliminary decree and not a final decree.

10. Section 54 only provides for a ministerial functions of a court. It cannot be termed to be an execution proceeding.

12. A bare perusal of Section 54 read with Order XX, Rule 18 of the Code leaves no manner of doubt that the application filed before the Court to send decree and papers to Collector to carry out partition was not and could not have been an application in execution.

If it was not an application for execution, the question of the application of the provisions of the Limitation Act would not apply.

Reliance has been placed by Mr. Sundaravardan on Venkata Reddy and Ors. v. Pethi Reddi [AIR 1963 SC 992]. Therein this Court was concerned with the meaning of the words 'final decision' vis-a-vis 'preliminary decree for partition' and in that factual backdrop, it was opined :

“It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Ss. 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be “modified and amended”. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted

by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree-the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

13. The distinction between 'a final decree' and 'finality of a decree' is obvious enough to merit a detailed

discussion. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decrees.

Section 2 (2) of the Code clearly shown as to the nature of the decrees that the court may pass.

14.This aspect of the matter has been considered in *Shankar Balwant Lokhande (Dead) by L.Rs. v. Chandrakant Shankar Lokhande and Anr.* (1995) 3 SCC 413, wherein it has been held :

“8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his $1/6^{\text{th}}$ right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of $1/6^{\text{th}}$ and $5/6^{\text{th}}$ shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to be partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all.”

Recently, albeit on a different factual backdrop, this Court in Hasham Abbas Sayyad v. Usman Abbas Sayyad and Ors. (2007) 2 SCC 355, opined :

“9. A final decree proceedings may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree”.

14. In the light of the above, this petition is allowed. The impugned order dated 11/06/2014, is quashed set aside and application Exhibit 81, is allowed. The executing Court shall direct the Court Commissioner Shri T.S. Pathan, to complete the work of Court Commissioner and submit a report as

expeditiously as possible and preferably within a period of six weeks from today. The petitioner shall place a copy of this order on record in R.D. No. 23/2009.

(RAVINDRA V. GHUGE, J.)

S.P.C.