

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 935 OF 2016

NAVNATH GAYAJI BIDVE AND OTHERS
VERSUS
TARAMATI UDDHAV ZAMBRE AND OTHERS

...
Advocate for Petitioners : Shri Thigale Girish K. (Naik)
Advocate for Respondent 1 : Shri Deshpande Dhananjay P.
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CORAM : RAVINDRA V. GHUGE, J.
Dated: December 07, 2017
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PER COURT :-

1. By this petition, the petitioners / defendants have prayed for the setting aside of the order dated 28.10.2015 passed on application Exhibit 40. It is further prayed that application Exhibit 40 be allowed.

2. I have considered the submissions of the learned Advocates for the petitioners and the respondent No.1. Respondents 2 to 5, though served, have not caused an appearance, either through an advocate or in person. Respondent No.6 has passed away and respondent No.1 is the L.R. of the deceased respondent No.6.

3. Considering the order that I am passing, I deem it appropriate not to refer to the entire contentions of the litigating sides, since the

ends of justice would be met by directing the executing Court to reconsider application Exhibit 37/D and application Exhibit 40 afresh.

4. The contention of the petitioners is that the preliminary decree cannot be executed by the executing Court since it involves such portion of immovable property which is subjected to the payment of taxes to the State. Reliance is placed upon Section 54 and under Order XX Rule 18 of the CPC by the petitioners for the purposes of effecting the partition of the land pursuant to the preliminary decree.

5. Section 54 and Order XX Rule 18 of the CPC read as under:-

" Section 54 - Partition of estate or separation of share.

Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Order XX Rule 18. Decree in Suit for partition of property or separate possession of a share therein.-

Where the court passes a decree for the partition of property or for the separate possession of a share therein, then-

(1) *if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;*

(2) *if and in so far as such decree relates to any other immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."*

6. There is no dispute that the preliminary decree covers a constructed portion of a house, the vacant land surrounding the constructed portion and the agricultural land. The petitioners rely upon the judgments delivered by this Court in the matters of Lataru Sapaku Thakur Vs. Hansaram Sakharam Pardhi [1983 BCI 50], Kisan Bhikaji Dalvi Vs. Kirshnabai Maruti Dalvi [2000 (4) Mh.L.J. 485] and Gram Yuvak Adhar Gramin Bigar Sheti Sahakari Patsanstha Maryadit and another Vs. Kashinath Ramchandra Wale

and others [2011 (1) Bom.C.R.214].

7. In Kisan Bhikaji (supra), this Court has concluded in paragraph No.12 that when there is a declaration of a share in the partition suit with respect to land assessable to land revenue, the job of the Civil Court comes to an end by making a declaration and all further proceedings regarding effect of the partition, may be by first preparing a final decree and then by executing the same which is to be carried out by the Collector under Section 54. It is further considered that when the decree is a preliminary decree, further steps in such a suit are required to be taken by the Collector and for that purpose, the Civil Court has to transmit the papers to the Collector. Thereafter, the Collector has to take appropriate steps for partition, as per the directions issued in the decree. It is not expected that any final decree be prepared by the Civil Court.

8. Shri Deshpande, learned Advocate for respondent No.1 has strenuously contended that it will first have to be assessed as to whether the portion equal to 1/11th share, which is to be handed over to the decree holder, would be assessable to land revenue and as to whether, it would be covered by Section 44.

9. Both the impugned orders dated 28.10.2015, passed on applications Exhibits 37/D and 40, hardly contain any reasons and

evaluation of the contentions of the parties. In Exhibit 40, the petitioners have specifically raised the issue of Section 54 of the CPC.

10. Considering the above, this petition is partly allowed. The impugned orders dated 28.10.2015, passed on applications Exhibits 37/D and 40 are quashed and set aside and both these applications are remitted to the executing Court in Misc. Civil Application No.316 of 2009. Needless to state, all contentions of the litigating sides are kept open and the executing Court, while considering the same would pass a reasoned order in the light of their contentions and the provisions of law invoked by the litigating sides.

11. At this juncture, learned Advocates for the respective sides submit that they would appear before the executing Court on 20.12.2017. The said request is accepted. Thereafter, the executing Court shall hear the litigating sides on both the applications and decide the same as expeditiously as possible and preferably on/or before 28.2.2018.

(RAVINDRA V. GHUGE, J.)

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