

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION No. 563 OF 2016

1. Smt. Gonglem Shirodkar,
(Since deceased through Lrs. Which are
already on record as JD's No. 5 to 13)
 2. Shri Shankar Salgaonkar
Original defendant no. 2.
 3. Shri Sham Shirodkar
Original defendant no. 5
Resident of Colconem, Verla,
Parra, Bardez, Goa
(House no. not known)
 4. Shri Deulo Shirodkar alias Devidas Shirodkar
Original defendant no. 8
 5. Shri Shiva Shirodkar
Major, (Original defendant no. 9,
 6. Shri Mohan Shirodkar
Major, (Original defendant no. 10,
Now married to
10(a) Manda Mohan Shirodkar,
 7. Smt. Keshri Shirodkar
Major, (Original defendant no. 11,
All nos. 8 to 11, Residents of Colconem, Verla,
Parra, Bardez, Goa
(House no. not known)
 8. Smt. Deepali Shirodkar
W/o Devidas alias Deulo Shirodkar,
(Original defendant no. 12,
 9. Smt. Shilpa Shirodkar,
Major, W/o Shiva Shirodkar
(Original defendant no. 13)
Both Resident of Colconem, Verla
Parra, Bardez, Goa
(House no. not known)
- ... Petitioners**
- V/s.
1. (Smt. Satyavati Calangutkar)
Major, Landlady,
(since deceased through legal heirs Respondent nos. 2-6, 1a & 1c)

- 1a. Mrs. Savidha Suresh Kalangutkar, (Daughter in law)
Wife of Suresh Kalangutkar,
Major in Age, housewife
 - 1b. Mrs. Dipshree Deepak Kalangutkar, (Daughter in law)
Wife of Deepak Kalangutkar
Major in Age, housewife
 - 1c. Mrs. Milan Vidyadhar Kalangutkar, (Daughter in law)
Wife of Vidyadhar Kalangutkar
Major in Age, housewife
All Resident of House no. 28
Colconem, Verla, Parra, Bardez, Goa.
 2. Kum.Sugandi T. Calangutkar, Major,
 3. Kum. Ujwala Calagutkar,

All majors, residents of House no. 28
Colconem, Verla, Parra,
Bardez, Goa.
- ... Respondents
(Original Decree**
- Holders)**
4. Shri Suresh Tukaram Calangutkar
Major, employee
 5. Shri Deepak T. Calangutkar,
Major
 6. Shri Vidyanand Calangutkar
All Resident of House no. 28,
Colconem, Verla,
Parra, Bardez, Goa (original plaintiffs nos. 2,
3 and 5 joined as Proforma Parties).
- ... (Contesting Respondents.)**
7. Smt. Pyari Salgaonkar, (since deceased) through
Lrs. Already on record as JDs no. 2
Original defendant no. 3,
Both nos. 2 and 3 residents
of Colconem, Verla, Parra, Bardez, Goa
(House no. not known)
 8. Shri Vishnu Salgaonkar,
Original defendant no. 4 (since deceased through Lrs. Already
on record as JDs no.2 and 3)
 9. Smt. Sudha Shirodkar

Major, All nos. 6(a) to 6(c) and no. 7, Residents of Alto Porvorim,
Near Defence Colony, Porvorim,
Bardez, Goa. (House no. not known)

10. Shri Chandrakant Shirodkar,
(Since deceased) Original defendant
no. 6, Represented through LR'S
10(a) Miss Virali Shirodkar, Major
10(b) Miss Pranali Shirodkar, Major
10(c) Master Nikhil Shirodkar, Major
 11. Jean D'souza,
(Original defendant no. 14)
 12. Florence Rego
(Original defendant no. 15)
 13. Shri S.M. D'souza
(Original defendant no. 16)
All r/o. 250, Mahatma Gandhi Road,
Poona-2. **... (Proforma Respondents)**
- Mr. Somnath Karpe, Advocate with Mr. Vallabh
D. Pangam, Advocate for the Petitioners.

Mr. S. Vales, Advocate for the Respondents.

Coram :-C. V. BHADANG, J

Date : 12th June, 2017.

ORAL JUDGMENT:

The petitioners who are the Judgment Debtors are challenging the Orders dated 05.12.2012 and 25.02.2016 passed by the Executing Court in Execution Application No. 3/2011/A.

2. The brief facts are that by Judgment and Decree dated 31.01.2004 in Regular Civil Appeal No. 177/2000 the learned Adhoc-Additional District Judge, Panaji, whilst allowing the appeal, decreed Regular Civil Suit No. 97/84 in the following terms:

“Appeal is allowed with costs throughout.

The Judgment and Decree passed by ld. trial Court in

Regular Civil Suit no. 97/84 is set aside.

The suit property be partitioned by metes and bounds by appointing Commissioner in the matter and the separate 4/5th share of the appellants and the share of respondents in rest of the property be demarcated and the appellants and respondents are directed to put in their respective shares fallen in favour of them in the partition of demarcation.

The other reliefs specifically claimed and not come to be granted deems to be rejected.

Preliminary decree be drawn accordingly.”

3. Indisputably, the said Judgment and Decree was unsuccessfully challenged by the Petitioners before this Court in Second Appeal No. 77/2004 which has been dismissed on 21.06.2006. Thus, the preliminary decree has attained finality.

4. The Respondents/Decree Holders filed an application for execution of the Decree and sought following assistance from the Court:

“10. Mode of which the assistance of the Court is required:-

A commissioner be appointed to partition the suit property by metes and bounds and to separate the 4/5th share of the Decree Holders and the Judgment Debtors Nos. 17, 18 and 19 and the share of the Judgment Debtors Nos. 1 to 16 in the suit property known as “Gonvol” or “Colconem”, not described in the Land Registration Office but enrolled in the Taluka Revenue Office under No. 1277 of the IInd Division of Parra and presently surveyed under survey No. 156/1 of the Village of Verla, Parra, Bardez, Goa, by partition and demarcation at

loco. Boundary stones may also be ordered to be fixed at site. Costs involved in the process be ordered to be borne by the parties equally.”

5. The petitioner filed an objection claiming that in the absence of the passing of a final decree, the execution cannot proceed. The Execution Court dismissed the objection by Order dated 05.12.2012. This was not challenged by the petitioners. Subsequently, the Respondent filed an application at Exhibit D-31 for appointment of Commissioner which was again objected to by the petitioners. That application is allowed by the Execution Court by Order dated 25.02.2016. Both these Orders dated 05.12.2012 and 25.02.2016 are subject matter of challenge in this petition.

6. The only contention raised on behalf of the Petitioners is that the execution cannot proceed without drawing of a final decree. On behalf of the petitioners strong reliance is placed on the division bench Judgment of this Court in the case of **Bashiruddin Khwaja Mohiuddin versus Binraj Murlidhar & others**: 1986(3) Bom.C.R.590 and the decision of the Hon'ble Supreme Court in the case of **S. Sai Reddy versus S. Narayana Reddy**: 1991 DGLS (Soft.)33.

7. On the contrary it is submitted by the learned Counsel for the respondent that a partition decree falls in two classes namely, the one which is relatable to Order XX Rule 18(1) and the other being related to

Order XX Rule 18(2) of CPC. It is pointed out that Order XXVI Rule 13 of CPC provides that, where a preliminary decree for partition has been passed, the Court may, in any case not provided/covered by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in the said Decree. It is submitted that all that the Impugned Order directs is the appointment of a Commissioner for effecting partition by metes and bounds. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the Civil Appeal No. 4187 of 2008 dated 27.04.2017 in the case of **Venu versus Ponnusamy Reddiar (Dead) Thr. Lrs & Anr.**

18. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference has been made out. Learned Counsel for the parties do not dispute that the subject matter of the property is a residential property and as such the preliminary decree would be relatable to Order XX Rule 18(2) of CPC. The division bench of this Court in the case of **Bashiruddin Khwaja Mohiuddin versus Binraj Murlidhar & others**, after taking note of the provisions contained in the Civil Manual has held that in respect of partition decree under Order XX Rule 18(2) it is the Court who has to suo moto, without an application from a party, to take proceedings for drawing of a final decree. Order XXVI Rule 13 of CPC also provides that where a preliminary decree for partition has been passed, the Court

may in any case not provided for by Section 54, issue a commission to such person/s as it thinks fit to make the partition or separation according to the rights as declared in such decree. It can thus be seen that the Court is bound to appoint a Commissioner in order to effectuate the partition decree by partitioning the property by metes and bounds.

9. I have carefully gone through the Impugned Orders and I do not find that they suffer from any infirmity. The proceedings which are initiated before the learned Trial Court would be in the nature of final Decree proceedings leading to final Decree as may be passed.

10. The Judgment in the case of **Prema versus Nanje Gowda and others: 2011 DGLS (Soft.) 403** is distinguishable on facts . The Hindu Succession Act was amended conferring a share on the unmarried daughters. That amendment came after the preliminary decree was passed and the question was whether the preliminary decree had the effect of actual partition. The Hon'ble Apex Court, inter alia, held that the mere passing of the preliminary decree does not result into actual partition being effected. In the present case as noticed earlier, all that the Executing Court has done is to appoint a Commissioner which it can appoint under Order XXVI Rule 13 of CPC. The petition is without any merits and is, accordingly, dismissed.

C. V. BHADANG, J.

msr.