

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5098 OF 2015

Jagannath Kaka Nangare & Ors. ... Petitioners
Vs.
Anna Appa Mang (Decd.)
through LRs Atmaram Anna Mang & Ors. ... Respondents

Mr. Manoj Patil, Advocate for the Petitioners.
Mr. Bhushan Walimbe, Advocate for respondent nos. 1A.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 17th July, 2017.

P.C.:

This Writ Petition is directed against the order dated 27th March, 2014 passed by 3rd Joint Civil Judge Junior Division, Islampur below Exhibit 1 in Regular Darkhast No. 163 of 2013. Regular Civil suit No. 376 of 1946 for partition was decreed after compromise pursis on 31st August, 1948. After 64 to 65 years, the respondents filed Regular Darkhast No. 163 of 2013 in which the petitioners are made the party-respondents. The petitioners though were not parties in Regular Civil Suit No. 376 of 1946, they were made party-respondents because they had purchased some portion of total suit land, i.e., 7 acres and 31 R by registered sale deed on 13th December, 1971. At the time of hearing of Regular Darkhast No. 163

of 2013 though the order of paying of process fees was passed against the decree holders, i.e., respondents, the Executing Court without taking care of the compliance of the same, on 27th March, 2014 issued order under section 54 of Code of Civil Procedure. The petitioners, who are now claiming to be owners and in possession of some portion of the suit land, being aggrieved with the said order, filed this Writ Petition.

2. The learned counsel for the petitioners has submitted that the petitioners are the necessary parties in the execution proceedings and they are made parties, as they are the owners and in possession of some portion of the suit land lawfully. He further relied on the roznama of Executing Court and submitted that the Executing Court by order dated 5th December, 2013 issued notice to judgment debtors and also directed the decree holders to pay the process fees. Thereafter on 20th December, 2013 there was endorsement that for want of process fees, the notices were not served on judgment debtors and again the Court directed the decree holders to pay the process fees. The learned counsel submitted that the matter was taken on 3rd March, 2014. Though the said order was not complied with by the decree holder, the Court by order dated 27th March, 2014

has passed the order of sending the matter under section 54 to the Collector and disposed of Darkhast proceedings. He submitted that the order passed by the Court is illegal, as it violated the right of the petitioners to object the process of partition under section 54 of CPC. He has submitted that the petitioners have lost the opportunity to put up their case before the Executing Court. He relied on Order 21 Rule 22 of the CPC which states that show cause notice is to be issued in certain cases especially wherein the decree is filed after the period of limitation, i.e., 12 years in this case. He also relied on Article 136 of the Limitation Act wherein the period for execution is only 12 years. He further relied on the judgment of the Hon'ble Supreme Court in the case of **Bimal Kumar & Anr. vs. Shakuntala Debi & Ors., reported in 2012(2) ALL MR 981 (S.C.)** and submitted that in this case, the Hon'ble Supreme Court has considered that if at all the compromise decree remained pending and not considered for 12 years, the Executing Court needs to consider the limitation under section 136 of the Limitation Act especially in the case of compromise decree. The learned counsel further submitted that if the Collector acts under section 54 of the CPC, then the petitioner is going to lose the opportunity to oppose the partition in execution proceedings.

3. Per contra, the learned counsel for the respondent No. 1A has submitted that the order is passed under section 54 of the CPC. The Application was moved for measurement of the property and partition. He submitted that the Application for sending the matter for preliminary decree under section 54 of CPC in fact is not the Application in execution and, therefore, the provisions of limitation Act are not attracted in such cases. In support of his submissions, he relied on judgment of Single Judge of this Court in the case of **Annasaheb Rajaram Nagane & Anr. vs. Rajaram Maruti Nagane & Ors., reported in 2001(3) Mh. L.J. 53**. He further submitted that the petitioners have filed separate application under Order 21 Rule 97 of the CPC and they can very well seek their remedy in that proceedings.

4. Perused the impugned order so also the roznama. The respondents/deGREE holders have moved the Application which is numbered and styled as Regular Darkhast No. 163 of 2013 wherein the petitioners are made party-respondents. It is also not disputed that the original plaintiffs and original defendants have entered into compromise decree and suit was decreed accordingly on 31st August, 1948 and in the original suit, these petitioners were not the party. As

per their case, they have purchased some portion of the suit land, i.e., 7 acres and 31R out of approximately 34 acres of land by registered sale deed dated 13th December, 1971. In between from 1948 to 2013, no steps were taken by the decree holders, i.e., nearly for 64 to 65 years in pursuant to execution of compromise decree.

5. The application was made for partition and possession pursuant to decree. However, this being the decree in the partition suit of the immovable property, the trial Court has rightly passed the order of sending the matter under section 54 of the CPC to the Collector. However, the Application filed by the decree holders should have been considered as a Miscellaneous Application under section 46, i.e., for precept. However, it was treated as execution proceeding and numbered as Regular Darkhast No. 163 of 2013. The learned trial Court also passed the order of issuing notice for which process fees is to be paid by the decree holders. If the application is preferred by the decree holders under section 54 requesting the Court to send precepts to the Collector, then it is between the decree holders and the Court and if the Court thinks fit, may issue precept to any other Court competent to execute such decree. Under section 54 of the CPC where decree is for partition of

an undivided estate which is assessed to payment of revenue to the Government, then it is the Collector who is the competent authority to get the property measured and shares metes and bounds and give separate possession of the shares to the shareholders of the property. This issue is not resintegra, as in the case of **Annasaheb Rajaram Nagane** (*supra*), the Single Judge of this Court while dealing with Order 20 Rule 18 of passing preliminary decree for partition, has considered separately section 54 of the CPC and Article 136 of the Limitation Act. It is useful to reproduce the same, which reads thus:

“Any application seeking direction to send necessary papers to the Collector, should be disposed of within 30 days from the receipt thereof, treating it as an application filed in the disposed of suit, without opening any independent proceeding in this behalf. Such application should be treated as a request to a Judge or Court to send necessary papers to the Collector for effecting partition under section 54 of Civil Procedure Code. Such application is really nothing, but a request to the Judge or Court to discharge his ministerial duty. In view of this, even no notice to any of the parties to the application is necessary as it is not a petition seeking any adjudication of any of the rights fo the parties.”

6. In the present case, the Collector may measure the suit land and may carve out the shares of the parties, however, no physical possession can be given to the parties, as the petitioners have filed an Application under Order 21 Rule 97 of the Code of Civil Procedure

and it is to be entertained as a suit by the Executing Court and the Executing Court is directed to decide all the issues and the questions involved in respect of execution of the decree in the said proceedings. The learned counsel for the respondent No. 1A has submitted that the ratio laid down in **Bimal Kumar** (*supra*) is not applicable in the present set of facts, as it is distinguishable though the case in hand and the case of **Bimal Kumar** pertains to compromise decree. I do not think it appropriate to deal with the said judgment at this stage. It is open for the petitioners to raise the issue of limitation on the basis of the judgment of the Hon'ble Supreme Court before the Executing Court, so also the petitioners may seek necessary orders from the Executing Court.

7. The Collector shall complete the work of measurement and fixing of the shares within six months. The possession shall not be handed over for a period of six months or till the Application of the petitioners which is before the Executing Court, whichever is earlier.

8. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)