

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 1234 OF 2016
WITH
CIVIL APPLICATION NO. 1640 OF 2012
IN
FIRST APPEAL NO. 1234 OF 2016**

Sou.Padmashri Dilip Mule & Ors.

...Appellants

Versus

Smt. Mandakini Appaso Patil & Ors.

...Respondents

.....

Mr.Ashutosh M. Kulkarni for the Appellants.

Mr.Nagesh Y. Chavan for Respondent Nos. 1 to 4.

.....

CORAM: MRS.MRIDULA BHATKAR, J.

DATE : DECEMBER 13, 2017

P.C.:

1. This First Appeal is directed against the order dated 9th December, 2011 passed by the learned District Judge-1 & Member, M.A.C.T., Solapur thereby rejecting the applications below Exhibits 43 and 45 in M.A.C.P. execution proceeding No. 32 of 2006. The only challenge given in this Appeal is that the applications resisting the attachment of immovable property were filed by the appellants under Order 21 Rules 58 and 59 of the Code of Civil Procedure, 1908

(hereinafter referred to as the CPC). The executing Court i.e. Motor Accident Claims Tribunal, Islampur ought to have tried the said applications after framing an issue and giving an opportunity to lead evidence and thereafter, dismissed the said applications by its order. The challenge is based on the procedure.

2. Appellant no.1 is a wife and appellant nos. 2 and 3 are children of respondent no.5. Respondent no.5 was a sole opponent in M.A.C.P. No. 47 of 2000 (New MACP No. 312 of 2002), which was decided on 27th July, 2006 thereby directing him to pay the amount of compensation of Rs. 4,60,008/- alongwith interest @ 9% p.a. to present respondent no.1, who is wife of the deceased Appaso Patil. Appaso Patil died in an accident on 27th November 1999, which occurred due to dash given by respondent no.5. During pendency of the claim application filed by respondent nos. 1 to 4, on 6th March 2000, the tribunal had passed the order of attachment of the properties under Order 38 Rule 5 of the CPC. The suit properties were again attached in this proceeding on 21st August, 2008 by the order below Exhibit 33.

3. Learned counsel for the appellants has submitted that it was

necessary for the executing Court to give an opportunity to the appellants to lead evidence. He has further submitted that the properties, which are under attachment, cannot be attached because they are already divided between the appellants and respondent no.

5. Appellant no.2 through appellant no.1, who is a guardian of appellant no.1, had filed Regular Civil Suit No. 682 of 1999 against respondent no.5 for partition and separate possession of the suit properties. The said suit was decreed on 17th June, 2004. He has further submitted that the appellants were not allowed to bring this material fact on record, which is very relevant in the applications resisting the execution of the attachment of suit properties. He has further submitted that pursuant to the said decree, a Deed of Partition was registered on 19th August, 2006. In support of his submission, he has relied on the judgment of this Court in the case of ***Ballappa Sidhappa Guddodagi and others vs. Bhagavva Nagappa Magdum (D) thr. Legal Heirs and others*** reported in ***2015 (5) Mh. LJ. 745.***

4. Per contra, learned counsel for respondent nos. 1 to 4/deed holders has submitted that the accident took place on 27th November, 1999 and the suit for partition and separate possession was filed by

the appellants on 17th December, 1999 with an ulterior motive in anticipation to resist the decree, which is going to be passed in the claim application. Partition suit ex facie was collusive suit. He has further submitted that after passing of the decree, the second son is born.

5. In the case of ***Ballappa Sidhappa Guddodagi and others*** (*supra*), the decree was in respect of the immovable property. However, the application was filed by the obstructionist. The executing Court without framing an issue and not giving opportunity permitting the parties to lead evidence, rejected the objections and thus, it was held that the Court has committed an error of law, deviating the procedure laid down under Order XII of the CPC.

6. Be that as it may, I am of the view that the suit is for partition and the executing Court ought to have tried the applications like suit and then should have disposed of the same. Hence, I set aside the order passed by the executing Court on the ground of procedural illegalities with following directions:

- (i) The executing Court to hear the applications after framing an issue and by giving an opportunity to lead evidence.
- (ii) Parties to cooperate the executing Court and the executing Court to decide this matter on or before 28th February, 2018.
- (iii) Parties to appear before the executing Court on 19th December, 2017 at 11.00 a.m.

7. The submissions made and the facts pointed by the learned counsel for respondent nos. 1 to 4 are very material and to be taken into account. However, no deviation from the procedure by the executing Court is allowed.

8. The appellants shall not transfer or alienate or handover the suit properties, which are subject matter of the execution proceedings so also they shall not create any encumbrance or any third party right or shall not part with the possession in any manner.

9. With this First Appeal is allowed and is disposed of accordingly.
Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)