

Mr. R. A. Thorat, Senior Advocate a/w. Mr. S. P. Chavan i/b. Ms Pratibha Shelake for Petitioner.
Mr. Dilip Bodake for Respondents No.1, 4 and 5.

P.C. :

Heard Mr. Thorat, learned Senior Counsel for the petitioner and Mr. Bodake, learned Counsel for the respondents No.1, 4 and 5 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'judgment debtor No.2', has challenged the judgment and order dated 29.01.2016 passed by the learned 2nd Joint Civil Judge, Junior Division, Satara below exhibits 57 and 58 in Regular Darkhast No.90 of 2006 as also the judgment and order dated 30.06.2016 passed by the learned 5th Joint Civil Judge, Junior Division, Satara in Review Application No.3 of 2016. By order dated 29.01.2016 below exhibits-57 and 58, the learned trial Judge allowed those applications and directed Collector, Satara to effect partition under Section 54 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') as per the decree passed in R.C.S.No.334 of 1966. By order dated 30.06.2016, the learned trial Judge dismissed the application seeking review of order dated 29.01.2016.

3. Rule. Mr. Bodake waives service for respondents No.1, 4 and 5.

Mr. Thorat orally applies for deleting rest of the respondents on the ground that respondents No.1, 4 and 5 are the only contesting respondents. In view thereof, leave to delete as prayed for is granted. Amendment shall be carried out forthwith. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Respondent No.1, hereinafter referred to as 'plaintiff', had instituted Suit No.234 of 1966 for partition and possession of his share in the joint family property and for mesne profits. On 23.06.1967, the learned trial Judge decreed the Suit. The learned trial Judge declared that a portion of 2 Acres and 2 Gunthas out of Revisional Survey No.490/1 of Kodoli and Survey No.90/2 admeasuring 19 Gunthas of Khed and house property situate at Grampanchayat House No.57 of Sangam Mahuli is the joint family property. Plaintiff is entitled to 1/5th share in the said property. The learned trial Judge directed partition of house property situate at Grampanchayat No.57 to be effected through a Commissioner. He further directed that while effecting partition of agricultural lands through Collector or his subordinate, parties will ensure that judgment debtor No.2 gets 1 Acre and 2 Gunthas within the boundaries given in the sale deed dated 22.04.1946 at exhibit-47 from Survey No.490/1 as her Stridhan property and remaining portion be divided into 5 equal parts. It is common ground between the parties that the controversy in the present Petition is only in respect of Survey No.490/1.

5. In support of this Petition, Mr. Thorat submitted that C.R.A.No.935 of 1983 was instituted by Govind Genu Pawar and Shahubai - judgment debtor No.2 inter alia contending that plaintiff-

decree holder represented before the Court that Survey No.490/3 is part and parcel of R.S.No.490/1 and consequently, he is entitled to share in Survey No.490/3 as well. This Court allowed the Civil Revision Application on 19.03.1984 and set aside the order passed by the learned trial Judge directing that plaintiff-decree holder is entitled to share in land bearing Survey No.490/3. In other words, Mr. Thorat submitted that this Court held that Survey No.490/3 is not part of execution proceedings initiated in pursuance of decree passed in R.C.S.No.334 of 1966. He has taken me through the-

(A) 7 x 12 extracts of -

- (i) Survey No.42/1A which was having old R.S.No.398/1A;
- (ii) Survey No.42/1B which was having old R.S.No.398/1B; &
- (iii) Survey No.42/3 which was having old R.S.No.398/D.

(B) Certificate dated 28.09.2007 issued by Talathi, Dhangarwadi, Taluka and District Satara;

(C) Regular Darkhast No.90 of 2006 filed by the plaintiff-decree holder and in particular inclusion of Survey No.42/3 admeasuring 18 Are.

6. He submitted that Survey No.42/3 corresponds to old Survey No.490/3, and therefore, plaintiff- decree holder could not have included this property while executing decree passed in R.C.S.No.334 of 1966. He submitted that petitioner will not press this Petition if it is clarified that while executing the decree passed in R.C.S.No.334 of 1966, Survey No.42/3, which according to him corresponds to Survey No.490/3 is excluded from the execution proceedings.

7. On the other hand, Mr. Bodake supported the impugned orders. He submitted that earlier, old Revision Survey Number was 490/1, which was re-numbered as Revision Survey No.398/1A, B, D, which

was subsequently re-numbered as Survey No.42/1A, 42/1B and 42/3. In other words, he submitted that survey No.42/3 is part and parcel of old R.S.No.490/1. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, it is not in dispute that the Suit instituted by the plaintiff was decreed on 23.06.1967. The controversy in the present Petition centers around partition of Survey No.490/1. It appears that the decree was passed on the premise that Survey No.490/1 admeasures 2 Acres and 2 Gunthas. Now, it is evident that said survey number admeasures 71 Are. The moot question is whether Survey No.490/3 corresponds to Survey No.42/3 as contended by Mr. Thorat or Survey No.42/3 is part and parcel of old R.S. No.490/1. It is not possible to resolve this controversy in this Petition.

9. In view thereof, parties will be at liberty to agitate this contention before the executing Court. The executing Court will consider whether Survey No.42/3 corresponds to Survey No.490/3 as contended by judgment debtor No.2. If the trial Court holds that Survey No.42/3 corresponds to Survey No.490/3, the same shall be excluded from the execution proceedings in view of the decision of this Court in C.R.A.No. 935 of 1983. If however, the executing Court finds that Survey No.42/3 forms part of Survey No.490/1 as contended by plaintiff / decree-holder, the same shall be included in the execution proceedings. It is also necessary to clarify that the learned trial Judge will proceed with the execution as per clause (2) of the operative part of the order dated 29.01.2016 as by clause (1) of the operative part, the learned trial Judge has allowed application exhibit-57 by which plaintiff-decree

holder has prayed for 1/3rd share to respondents No.1, 4 and 5 herein. In other words, the executing Court will proceed with the execution strictly in accordance with the decree passed in R.C.S. No.334 of 1966 and as per the shares determined therein. Subject to this clarification, it is not necessary to interfere with the impugned orders. Rule is discharged accordingly with no order as to costs.

(R. G. KETKAR, J.)

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