

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.276 OF 2008

1. Mrs.Mangala w/o Sharad Mutha,
Age-53 years, Occu-Business,
R/o 83, Maniknagar, Pune-Nagar Road,
Ahmednagar - 414 001
2. Sharad s/o Mansukhlal Mutha,
Age-57 years, Occu-Business,
R/o 83, Maniknagar, Pune-Nagar Road,
Ahmednagar - 414 001
3. Leelabai Ratilal Lodha,
Age-65 years, Occu-Household,
R/o 3728, Shahaji Road,
Ahmednagar - 414 001
4. Vijay s/o Ratilal Lodha,
Age-48 years, Occu-Business,
R/o 3728, Shahaji Road,
Ahmednagar - 414 001
5. Pradip s/o Ratilal Lodha,
Age-43 years, Occu-Business,
R/o 3728, Shahaji Road,
Ahmednagar - 414 001
6. Dr.Prakash s/o Kanihyalal Kankaria,
Age-48 years, Occu-Doctor,
R/o Surya Clinic, Maniknagar,
Ahmednagar - 414 001
7. Dr.Sudha w/o Prakash Kankaria,
Age-46 years, Occu-Doctor,
R/o Surya Clinic, Maniknagar,
Ahmednagar - 414 001
8. Sharad s/o Manakchand Gundecha,
Age-62 years, Occu-Business,
R/o Chandan Estate, Maniknagar,
Nagar-Pune Road,
Ahmednagar - 414 001
9. Arvind s/o Manakchand Gundecha,
Age-55 years, Occu-Business,

R/o Chandan Estate, Maniknagar,
Nagar-Pune Road,
Ahmednagar - 414 001

10. Dhanesh s/o Popatlal Gandhi,
Age-49 years, Occu-Business,
R/o Chandan Estate, Maniknagar,
Nagar-Pune Road,
Ahmednagar - 414 001

11. Prakash Dhanraj Munot,
Age-62 years, Occu-Agriculturist,

12. Chaya Prakash Munot,
Age-57 years, Occu-Household,

13. Indumati w/o Ashok Parakh,
Age-52 years, Occu-Household,

14. Abhay s/o Ashok Parakh,
Age-30 years, Occu-Business,

Respondent Nos. 11 to 14
are R/o Manik Nagar, Ahmednagar

- PETITIONERS

VERSUS

1. The State of Maharashtra,
Through its Secretaries,
Departments of Revenue and Forest
as well as Law and Judiary, M.S.
Mantralaya, Mumbai-32

2. The Collector,
Ahmednagar

3. Hasan Babu Zarekari,
Age-50 years, Occu-Business,
R/o Burudgaon

4. Venugopal Nandlal Dhoot,
Age-51 years, Occu-Business,
R/o Gangapur Ginning Compound,
Station Road, Ahmednagar

5. Mahadu Narayan Pawar,
Deceased through,
His Legal Heirs

5-A Balwant Mahadu Pawar,
Age-45 years, Occu-Agriculturist,

5-B Anusaya Mahadu Pawar,
Age-71 years, Occu-Household,

5-C Asha Ganesh Pawar,
Age-47 years, Occu-Household,

5-D Rahul Ganesh Pawar,
Age-23 years, Occu-Education,

5-E Kusum Vinayak Pawar,
Age-44 years, Occu-Household,

5-F Nitin Vinayak Pawar,
Age-24 years, Mentally retarded,

5-G Vithal Vinayak Pawar,
Age-21 years, Occu-Education,

5-H Priyanka Vinayak Pawar,
Age-16 years, Mentally Retarded

Respondent Nos.5-F and 5-H are
Mentally Retarded represented through
their legal guardian mother
i.e. Applicant No.5-E,

All R/o Shiv Krupa, Behind Ajay Gas,
Burudgaon Road, Ahmednagar,
Dist. Ahmednagar

- RESPONDENTS

Mr.R.R.Mantri, Advocate for petitioner Nos.1, 2 and 10.

Mr.S.S.Bora, Advocate for petitioner Nos. 3 to 7.

Mr.A.D.Ostwal and Mr.K.D.Jadhav, Advocates for petitioner Nos. 8 and 9.

Mr.S.R.Yadav-Lonikar, AGP for respondent Nos. 1 and 2.

Mr.R.N.Dhorde, Sr.Counsel h/f Mr.R.L.Kute, Advocate for respondent No.3.

Mr.A.S.Bajaj, Advocate for respondent No.4 and applicant in CA Nos.3094/2018, CA St.No.7374/2018 for intervention.

Mr.Shreehari G.Aney, Sr.Counsel with Mr.Ashwin K.Shete, Abhay Dhadiwal [i/by Jayakar and partners (i.e. R/A 5A, 5C and 5D]

Mr.N.V.Gaware, Advocate for respondent Nos.5A to 5H.

Mr.R.R.Sancheti, Advocate for respondent Nos. 11 to 14.

Mr.V.H.Dighe, Advocate for applicants in CA No.1888/2018 - for intervention.

Mr.A.P.Bhandari, Advocate for applicants (in CA No.3096/2018) for intervention.

(CORAM : RAVINDRA V. GHUGE, J.)

RESERVED ON : 10/03/2018
PRONOUNDED ON : 27/03/2018

JUDGMENT :

1. The petitioners are aggrieved by the order dated 07/01/2008 passed by the learned Civil Judge, S.D., Ahmednagar in Spl.Dkt.No.57/1977 and the order dated 24/12/2007 passed by the District Collector, Ahmednagar. It is prayed that the Civil Court be directed to send a corrected precept u/s 54 of the Civil Procedure Code to the Collector incorporating the modifications made by this Court in First Appeal Nos.78/1958 and 79/1958 and the orders subsequently passed by the Civil Court below application Nos.Exh.14, 17, 21 and 22 in Spl.Dkt.No.57/1977.

2. This matter had been decided by this Court by judgment dated 12/06/2008. The said judgment was challenged by some of the respondents before the learned LPA Bench of this Court which modified the decree. As such, plaintiff No.3 and others approached the Hon'ble Apex Court in Civil Appeal No.3586/2010. By order dated 02/08/2017, the Hon'ble Apex Court has set aside the judgments of the LPA Bench as well as the learned Single Judge and remanded WP

No.276/2008 with the following observations :-

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We feel that effect of the preliminary decree which has attained finality should be considered and also the effect of the order passed by the Mamlatdar to whom land has to be allotted as per preliminary decree as there was surrender of tenancy in the year 1952 as found by the Mamlatdar.

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s/p In the facts and circumstances and in order to do complete justice between the parties, we deem it proper to remit the matter to the Single Judge to hear the parties afresh and decide the writ petition afresh. All the questions which can be raised in accordance with Law by the parties are kept open.

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Parties to maintain status-quo with respect to alienation and possession till the disposal of the writ petition. It is open to any of the parties to move the High Court.

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Order passed by the Division Bench and by a Single Bench are hereby set aside.

3. I have heard the learned Advocates for the respective sides extensively on 05/03/2018, 06/03/2018, 07/03/2018, 08/03/2018 and on 10/03/2018. All the learned Advocates have taken me through the history of this litigation originating from 1956 onwards. Besides having canvassed their oral submissions for almost 15 hours over a period of 5 days, they have also entered their written notes of submissions. Several reported judgments have been cited.

4. Instead of reproducing their entire submissions and the long list of citations placed on record, in this judgment which would result in merely enlarging the size of the judgment, I would refer to only those issues which the Hon'ble Supreme Court has crystallized and the issues connected with the cause of action.

5. The whole issue in this matter turns upon the judgment and decree dated 30/09/1957 delivered in RCS No.13/1956. For the sake of clarity, I am summarizing the facts of the case as under :-

[a] Mahibubbhai was the owner of the entire suit property. He

died in 1948.

- [b] Defendant No.1 Mamulabi, who is the step mother of plaintiff No.1 Chotibi d/o Mahibubbhai, were the two surviving LR's. There is no dispute that the other children of Mahibubbhai passed away during his lifetime.
- [c] Two sisters of Chotibi had married Babu Itare who also died during the lifetime of Mahibubbhai.
- [d] As such, the whole suit property which was in the possession of Mahibubbhai was to devolve to Mamulabi and Chotibi.
- [e] Mamulabi started entering into sale transactions and initially sold some portions of the property to Khandu Ranu Phulsunder and Laxman Ranu Phulsunder. These two brothers later on sold some portions of the land to Sakharam Mahadeo Misal and Ramchandra Gopinath Misal.
- [f] Chotibi also sold some of the properties to Mahadu Narayan Pawar.
- [g] Since a dispute arose between Chotibi and her step mother Mamulabi, Chotibi alongwith Mahadu Narayan Pawar preferred RCS No.13/1956, which was decreed on 30/09/1957.
- [h] The petitioners herein claimed a right to the shares in the suit properties through Mamulabi, Phulsunder brothers and Misal brothers and such other subsequent purchasers to which I need not advert to.
- [i] Respondent Nos.3 onwards claimed a share to the property

through Chotibi.

6. The Trial Court has framed 38 issues while deciding the suit and has answered the said issues with detailed reasons, some of which I would advert to in this judgment. In so far as the relationship of Chotibi and her step mother Mamulabi with the deceased Mahibubbhai is concerned, the Trial Court has concluded that there is no dispute that Chotibi is the daughter of deceased Mahibubbhai and Mamulabi is her step mother and widow of the deceased.

7. While deciding the quantum of share of the plaintiff Chotibi and defendant No.1 Mamulabi, the Trial Court has concluded that Chotibi would be entitled to 7/8th share in the suit properties and Mamulabi would be entitled to 1/8th share. The Appellate Court (Division Bench of this Court) has not altered these shares.

8. Defendant Nos. 3 and 4 in the suit are the Phulsunder brothers. The Trial Court framed issue No.10 as to whether these brothers prove that they have purchased S.No. 131 and some portion of S.No.46/2 from Mamulabi by sale deed 08/07/1955 and also framed issue No.11 as to whether this sale deed would be binding upon the plaintiff Chotibi. The Trial Court concluded that no answer is necessary for these 2 issues since the plaintiff submitted a *purshis* Exh.62 and the names of these two brothers is to be deleted from the

suit. Consequentially, the issue whether these two brothers are in possession of the remaining portion in S.No.46/2 as tenants, was also rendered unnecessary.

9. Turning to the issue No.17, whether Chotibi proves that land S.No. 48/6 belonged to Mahibubbhai, it concluded in the affirmative. On issue No.18 as to whether defendant No.6 Dr.Bhaskar proves that he has purchased S.No.48/6 from defendant No.2 deceased Babu Itare, the Trial Court has answered in the affirmative, but further concluded while answering Issue No.19 that the said sale transaction would not bind the plaintiff. While dealing with issue No.20 as to whether defendant No.6 Bhaskar has bonafide purchased the land without notice, the Trial Court answered in the negative.

10. Issue Nos. 21 to 24 are with regard to defendant No.7 Sakharam Misal having purchased S.No.52/1 and 52/2 from Mamulabi by the two sale deeds dated 30/04/1952 and 23/09/1953. The Trial Court has answered in the affirmative and concluded that Sakharam has not proved that Chotibi had consented to the sale deeds and hence the said sale deeds would not be binding upon Chotibi.

11. With regard to the purchase of S.No.53/1B by defendant No.8 Ramchandra Misal from Mamulabi is concerned, the Trial Court framed issue Nos. 26 to 29 and concluded that though defendant No.8

had purchased the said land, the sale transaction between the two was not binding upon Chotibi and that defendant No.8 is not a bonafide transferee.

12. With regard to whether defendant No.8 was a protected tenant or is entitled to protection under the Bombay Tenancy and Agricultural Lands Act, the Trial Court framed issue Nos.31 and 32 and concluded that an answer to the said issues is not necessary since the question as to whether defendant No.8 was a protected tenant of the land purchased by him, was not necessary to be decided. It needs to be noted that subsequently, under orders of the Appellate Court, the Tahsildar has submitted his report that the Tenancy was surrendered in 1952.

13. With regard to the role of defendant No.9 Laxman Sitaram Bhosale was concerned, the Trial Court framed issue Nos.33 to 35 and concluded that defendant No.9 proves that he purchased land S.No.133/3 from Mamulabi. The said purchase was not bonafide and the sale transaction was not binding upon the plaintiff.

14. Finally, the Trial Court passed the following order in its judgment and decree dated 30/09/1957 as under :-

"1.It is hereby declared that the plaintiff No.1 has 7/8 share in the suit house and the suit land Survey No.50/4, the

plaintiff No.2 has 7/8 share in the suit lands survey Nos.47/6, 48/6, 53/1B, 133/3, 52/1 and 52/2, defendant No.1 lhas 1/8 share in the suit house and the suit lands survey Nos.46/2, 47/6, 131 and 50/4 , Defendant No.6 has 1/8 share in the suit land survey No.48/6, Defendant No.7 has 1/8 share in the suit lands survey No.52/1 and 52/2, Defendant No.8 has 1/8 share in the suit land survey No.53/1B, and Defendant No.9 has 1/8 share in the suit land No.133/3.

2. It is hereby directed under O.20, R.18 CPC., that on the interested parties paying the necessary court fee stamps the suit lands mentioned in para 1 of this order be patitioned and the plaintiff Nos.1 and 2 and Defendant Nos. 1 and 6 to 9 be put into separate possession of their respective shares therein as declared above, by the Collector or any gazetted Subordinate of the Collector deputed by him in this behalf.

3. It is hereby further directed that on the interested parties paying the necessary court fee stamps the suit house be partitioned and the parties whose shares therein are declared above, be put into separate possession of their respective shares therein by a Commissioner to be hereafter appointed by the Court in execution proceedings.

4. The plaintiffs and defendants Nos.6 to 9 to bear their respective costs of the suit. The names of defendants Nos.3 and 4 be deleted from the suit. The defendant Nos.3 and 4 to

bear their own costs."

15. The above judgment and decree was carried in a First Appeal Nos.78/1958 and 79/1958. Sakharam Mahadev Misal, original defendant No.7 was the appellant in Appeal No.78/1958 wherein original plaintiffs Chotibi and Mahadu Pawar and original defendant No.1 Mamulabi and No.2 Babu Itare, were the respondents. In First Appeal No.79/1958, original defendant No.8 Ramchandra Misal was the appellant and Chotibi and Mahadu Narayan Pawar, original plaintiffs, were the respondents. This indicates that rest of the litigants had accepted the decree of the Trial Court.

16. It needs mention, considering the litigating sides before this Court, that as Mahadu Pawar had purchased some portions of the land from Chotibi prior to the institution of the suit, he has joined Chotibi as a plaintiff. Similarly, Babu Itare was arrayed as defendant No.2 since he had got some of the lands sold alongwith Mamulabi. The judgment and decree of the Trial Court placed on record indicates that Mamulabi, Babu Itare and defendant No.5 Rangnath Yashwant Pandit had not appeared and the suit proceeded ex-parte against them.

17. The learned Division Bench delivered its judgment on 02-05-1963 / 24-09-1963.

The Appellate Court (High Court) recorded that the widow Mamulabi sold most of the lands to various defendants in the suit. She had sold 4 acres and 21 gunthas in S.No.46/2, 38 gunthas in S.No.131 to defendant Nos. 3 and 4 Phulsunder brothers. The widow then sold S.No.48/6 to defendant No.6, S.No.53/B to defendant No.8, S.No.133/3 to defendant No.9 and S.Nos. 52/1 and 52/2 to defendant No.7. The only lands that were not disposed of were in S.No.47/6 admeasuring 1 acre 34 gunthas and S.No.50/4 admeasuring 2 acres 30 gunthas. Chotibi had filed the suit for seeking partition and also claimed a share in the suit house, with a declaration that the sale deeds executed by Mamulabi were not binding on her.

18. The Appellate Court specifically recorded that the extensive contentions and defences of the defendants are not required to be taken into account as only defendant No.7 Sakharam Mahadev Misal and defendnat No.8 Ramchandra Gopinath Misal have appealed to the High Court. As such, the litigation for seeking a share in the property in between the plaintiffs and the defendants is brought to an end, save and except, the claim of defendant Nos. 7 and 8.

19. The Appellate Court then concluded that the names of these Misal brothers appears for the first time in the revenue records after Mahibubbhai's death. These Misal brothers claimed that the portions of land held by them are in their possession for about 9 years after

the demise of Mahibubbhai. Hence, the Appellate Court specifically observed as under :-

"We accordingly direct that the decree declaring the respective shares of the several parties be and is hereby confirmed, that the properties S.No.47/6, 53/1-B, 52/1, 52/2 and 50/4 and the house properties be equitably partitioned so that, as far as possible, defendant No.1 is assigned the whole survey numbers which have been purchased by defendant Nos. 7 and 8. In the event of such a partition not being possible, the Court will assign as much land out of these two survey numbers to defendant No.1 as is possible in consideration of her share in the house and other lands. As to the rest of the share the plaintiff will be entitled to reasonable compensation from defendants 7 and 8.

In order to do effective justice between the parties in this proceeding without driving them to further litigation in Tenancy Court, we direct the Lower Court to refer to the Mamlatdar, during the time that the partition proceedings are pending, the two following issues to be determined by him. The issues will be :

[1] Whether defendant No.7 proves that he was a tenant of Mahibubbhai and/or a tenant of the suit land S.No.52/1 and 52/2 and whether the tenancy is binding on the first plaintiff ?

[2] Whether defendant No.8 is a tenant of the suit land bearing S.No.53/1-B and whether the tenancy is binding on the first plaintiff ?

This inquiry will go on simultaneously with the enquiry regarding partition. The decision on these issues will not have any practical importance if equitable partition can be effected by the Lower Court. There will be no order as to costs."

20. However, by order dated 24/09/1963, the above order suffered a correction and the Appellate Court concluded as under :

"In the result we direct the following decree in modification of the one made by the learned trial Judge.

The 1st plaintiff will have 7/8 share in all the lands now in appeal and the house. There will be equitable partition as directed by us in our judgment and a further direction that if defendants 7 and 8 are held by the Mamlatdar in answer to the two issues which are to be referred to the Mamlatdar to be tenants of the land and to be entitled to remain on the land she will be entitled to fair rent of the land which falls to her share and which will continue in possession of defendants 7 and 8. They will also be liable to payment of this amount of rent in the event of the finding of the Mamlatdar being as above upto the date of decree as well. If it is held by the Mamlatdar that they are not tenants of the land, the 1st plaintiff will get possession of such land as falls to her share on partition as directed by us above and will also get mesne

profits from defendants 7 and 8 as claimed by her until delivery of possession. Partition proceedings to go on simultaneously with the enquiry by the Mamlatdar on the issues referred to him."

Based on the above directions, the Civil Court modified the decree by passing an order on 23/12/1963 as per the directions of the Appellate Court.

21. The learned Advocates for the petitioners have canvassed before me that the tenancy issue is not closed and is still open. Notwithstanding the observations of the Hon'ble Apex Court in the order dated 02/08/2017 concluding that *"there was a surrender of tenancy in the year 1952 as found by the Mamlatdar"* and the observations of the Appellate Court that *"in order to do effective justice between the parties in this proceeding without driving them to further litigation in Tenancy Court"*, the petitioners have argued that as an appeal has been filed against the report of the Tahsildar before the Collector, the issue of tenancy is still open.

22. I cannot accept the contentions of the petitioners that the issue of tenancy is subjudice before the Collector. The Appellate Court had specifically ruled that the parties now would not be driven to further litigation in the Tenancy Court and hence it ordered that the Lower Court would refer the matter to the Mamlatdar only to

cause an enquiry as to whether the tenancy rights of defendant Nos.7 and 8 are alive or not. It is thus obvious that the Appellate Court did not desire that the two issues framed by it vide its judgment dated 02/05/1963, should relegate the parties to further litigation in the Tenancy Court. The Appellate Court, therefore, framed the 2 issues and directed the Civil Court to refer the matter to the Tahsildar. The Tahsildar received the papers and the issues referred, which are registered as Kool Kaida Case No.5/2004 on 13/04/2005. It noted the directions of the Appellate Court and the issues cast and concluded that defendant No.7 Sakharam Misal and defendant No.8 Rambhau Misal have voluntarily relinquished their rights or claims flowing through the tenancy in relation to land S.No.52/1, 52/2 and 53/1-B in 1952. It is specifically observed that these 2 defendants have voluntarily surrendered the tenancy.

23. It is in the above backdrop that the Hon'ble Apex Court has observed in the order dated 02/08/2017 that this Court must consider the effect of the order passed by the Mamlatdar as there was a surrender of tenancy in 1952 as has been noted by the Mamlatdar. It is interesting to note that none of these petitioners have challenged the said order of the Tahsildar. It was the Court receiver Mr.Vishwas Dattatraya Aathare, Chandan Estate Court Receiver who has filed the Tenancy Appeal No.1/2005. The S.D.O. has passed an order on the same on 24/07/2006 concluding that the Collector is dealing with the

partition and hence there is no interference in the report of the Tahsildar.

24. As such, considering the observations of the Hon'ble Apex Court and for the reasons recorded as above, the First Appellate Court never intended to commence Tenancy Court proceedings with relation to the claim of defendant Nos. 7 and 8 and hence, the Hon'ble Apex Court has concluded that there was a surrender of tenancy in 1952.

25. The issue before the Executing Court which has led to the passing of the impugned order was that certain orders were passed by the Civil Court subsequently in 1981 and that had led to the modification of the decree as per the contentions of the petitioners. The strenuous submissions of the petitioners are that the execution proceedings No.57/1977 have been initiated by Chotibi and Mahadu Pawar and incorrect information was filled-in in Form No.6 under Order XXI Rule 11. It is because of the misrepresentation made by the decree holders which is at page No.76, that the Executing Court committed an error in forwarding a precept under its order dated 12/08/2004. Hasan Babu Zarekari, who had purchased some share of Mahadu Narayan Pawar / original plaintiff No.2, was also added as the decree holder. This misrepresentation and wrong precept being sent has caused the damage, since the Executing Court failed to take

cognizance of the following orders passed by the Executing Court :-

[1] Application Exh.14 was filed by third parties who were previously defendant Nos. 3 and 4 i.e. the Phulsunder brothers contending that they have purchased S.No.46/2 and 131 from the plaintiff / decree holder during the pendency of the suit. The plaintiff has sold these two survey numbers to these defendants and the Appellate Court had recorded that the first plaintiff Chotibi compromised with these defendants and had transferred her interest to them. The learned Court passed an order on 21/12/1981 that Survey Nos. 46/2 and 131 are ordered to be deleted and partition pertaining to the remaining lands would be effected as per the orders of the Appellate Court.

[2] The LR of Sakharam Misal moved application Exh.17 before the Executing Court on behalf of the third persons who previously were defendant Nos. 7 and 8 namely Sakharam Misal and Ramchandra Misal contending that land S.No.52/1 and 52/2 will have to be deleted from the decree as the plaintiffs do not have a right to any share in the said property and hence the Collector should not execute the darkhast with reference to these two properties. It was also contended that Chotibi has died and her legal heirs have sold their right, title and interest to defendant Nos. 7 and 8 on 17/05/2018. The Civil Court, by order dated 21/12/1981, concluded that the Appellate Court has allotted S.No.52/1 and 52/2 to the share of Mamulabi. Hence, it would be appropriate to direct the Collector to effect the partition of the agricultural lands by allotting S.Nos. 52/1

and 52/2 to defendant No.1 Mamulabi.

[3] Hasan Zarekari moved an application on 16/11/1981 Exh.21 stating that Mahadu Pawar has issued a "*Bechan Patra*" which is registered and has assigned his entire rights in favour of Zarekari. He, therefore, prayed for being added as a decree holder. By order dated 09/03/1998 passed after 17 years, the Executing Court permitted the addition of Hasan Zarekari as decree holder.

[4] Exhibit 22 filed by Mahadu Pawar seeking his deletion and for facilitating the addition of Zarekari, has not been specifically decided by the Executing Court. There is no order permitting the deletion of Mahadu Pawar.

26. The petitioners therefore canvassed that the District Collector cannot execute the decree considering the precept sent by the Trial Court since the orders below Exh.14, 17, 21 and 22 referred above, do not find a part of the precept and hence the deletion of S.Nos. 46/2 and 131 and specific allotment of S.Nos.52/1 and 52/2 to defendant No.1 Mamulabi, is not within the knowledge of the District Collector. If this is not made a part of the precept and is not brought to the notice of the Collector, the decree holders would seek a claim for 7/8th share in these 4 survey numbers, practically stealing the land from these petitioners.

27. Mr.Aaney and Mr.Dhorde, learned Sr.Advocates appearing on

behalf of the decree holders who derive their rights from Mahadu Pawar and Hasan Zarekari, submit that the decree delivered by the Hon'ble High Court as the First Appellate Court would be the final decree. The Hon'ble Apex Court has held that the decree has become final. Such a decree cannot be subjected to a modification though it may be a preliminary decree since the decree cannot be modified by filing applications or purshis.

28. Learned Advocates for the petitioners and the interveners counter this submission by stating that a preliminary decree can be modified in the light of reported judgments of the Hon'ble Apex Court. So also, if such a decree cannot be modified, then Hasan Babu Zarekari would be out of the Court as he has been arrayed as a decree holder alongwith Mahadu Pawar in the light of the order passed by the Executing Court on application Exhibit 21 on 09/03/1998. If Zarekari can be added as a decree holder in the darkhast proceedings, the same analogy can be made applicable and the orders dated 21/12/1981 on Exh.14 and 17, will have to be made a part of the precept. So also, these two orders dated 21/12/1981 have not been challenged by the decree holders in the past 36 years.

29. I find that after the precept was sent to the District Collector, there was a controversy in between the parties that the orders passed by the Executing Court below Exh.Nos.14, 17, 21 and 22 did

not find place in the precept. The petitioners contended that the District Collector should refer the matter to the Civil Court for correction in the precept. By order dated 25/08/2006, the District Collector concluded that as these petitioners did not take steps pursuant to the orders below Exh.14, 17 and 21, the precept cannot be corrected by the District Collector. He, therefore, declined to delete S.Nos. 46/2 and 131 from the precept. He, however, deleted S.Nos. 48/6 and 50/4.

30. The order of the District Collector was carried in RTS appeals to the Additional Commissioner, Nasik Division. By order dated 31/05/2007, the appeals were partly allowed and barring the direction of the District Collector deleting S.Nos.48/6 and 50/4, he set aside the entire judgment of the District Collector. The respondents herein preferred WP No.3636/2007 before this Court. By judgment dated 05/09/2007, this Court dismissed the writ petition with the following observations :-

- [a] These petitioners were entitled to raise all contentions before the Collector and the Collector was bound to consider them.
- [b] The decree passed by the Civil Court in Spl.C.S.No.13/1956 has been amended by the judgment of this Court in First Appeal No.78/1958 and 79/1958 and therefore, the said amended decree has to be executed.
- [c] The deletion of certain lands by the order below Exh.14 and 17

as well as the deletion of defendant Nos. 3 and 4 from the suit, will have to be considered by the Collector.

- [d] Certain lands have been declared as slum areas and that aspect also will have to be considered by the District Collector.
- [e] Since Hasan Babu Zarekari is the assignee of the share of Mahadu, his share also will have to be considered and the partition will have to be effected accordingly.
- [f] Considering the effect of Order XXI Rule 16 of the CPC., the assignee of a decree is entitled to the same conditions as the decree holder and therefore Hasan Zarekari will be entitled to his share.
- [g] The Collector, vide his letter dated 21/06/2006, had sought clarifications from the Executing Court in terms of the issues raised in the said letter. The Executing Court, on an erroneous premise, that it had become *functus-officio* has refused to issue any clarificatory order. It is well settled that the Civil Court can see if the Collector had acted in accordance with the decretal mandate. Therefore, the clarifications sought by the Collector cannot be said to be baseless.

31. In the above backdrop, the order of the Additional Commissioner, Nasik Division was sustained and the matter was remitted to the District Collector. After hearing all the litigating

sides, the District Collector has passed the impugned order dated 24/12/2007 observing that he can carry out equitable partition as is directed by the Appellate Court while modifying the decree and he can accordingly carry out the partition. He, however, observed that those litigants, who are beneficiaries of the order below Exh.14 and 17, will have to move the appropriate court and should get necessary orders, if they so desire. It was in this backdrop that these petitioners moved an application before the Executing Court which has been rejected by the impugned order.

32. The Executing Court, while rejecting the application filed by J.D.Nos. 13 and 22 and the purported third parties to the execution proceedings, has observed as under :-

[a] The decree has been modified by its predecessor as per directions in the judgments delivered by the High Court in Appeal No.78/1958 and 79/1958.

[b] The judgment debtors, who lost the litigation at the first appellate stage, had approached the Hon'ble Apex Court which dismissed their SLP both, on the ground of delay as well as on the merits on 04/12/2006.

[c] Under such circumstances, there is no necessity to modify the decree.

[d] The Division Bench of this Court has held in WP No.1597/2002 that all contentions of the parties can be raised

in execution proceedings before the Collector and the Collector can adjust the equities to the extent it would be possible.

[e] Considering the law laid down by the Hon'ble Apex Court in Khemchand Shankar Choudhary Vs. Vishnu Hari Patil [AIR 1983 SC 124], if decree is sent for partition of estate or separation of shares, a transferee, during the pendency of the partition can appear in such proceedings and claim equitable partition even though they were not parties to the suit.

[f] As the record is sent to the Collector and the Collector is executing the decree, it is necessary for him to comply with the directions of the High Court in WP No.1597/2002 and submit his compliance report to the High Court.

33. The contentions of the petitioners are that the orders dated 21/12/1981 under Exh.14 and 17 directing deletion of properties, have not been challenged by any of the litigating sides and the said orders are rendered final. These orders cannot be ignored and the Executing Court will have to make necessary corrections in the precept as well as the decree so as to implement the said orders. Though it is canvassed by the respondents that the said orders are illegal, such orders can be passed by the Executing Court in the light of the judgment delivered by the Hon'ble Apex Court in Ganduri

Koteshwaramma & Another vs Chakiri Yanadi & Another [2011 AIR (SCW) 6163]. Paragraph No.20 of the said judgment reads as under :-

"20. The High Court was clearly in error in not properly appreciating the scope of Order XX Rule 18 of C.P.C. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In Phoolchand, this Court has stated the legal position that C.P.C. creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings."

34. It is further canvassed by the petitioners that a precept that has been wrongly sent, can be recalled and can be corrected in the light of the law laid down by the Mysore High Court in the matter of Neelappagouda Vs. Ramangouda Patil and others Vs. Kariyappa Goud

[AIR 1965 Mysore 46] and by this Court in the matter of Mahadu @ Mahadeo Baji Bhosale Vs. Appaji Gunbarao @ Ganpatrao Bhosale and others [2003 (2) Mh.L.J. 216 = AIR 2003 Bombay 314]. This Court has held in paragraph Nos.8 and 9 as under :-

"8. Having heard the learned Counsel for the petitioner, I find that the learned District Judge could not have dismissed the appeal on the ground that the Civil Court becomes functus officio after it sends the decree for partition and cannot in any circumstances consider whether the Collector has effected partition in accordance with the decretal mandate. The reliance by the learned District Judge on the decision in the case of Lachhiram Jasram (supra) is misplaced. In the case before the Nagpur High Court the Applicant had applied under section 54 and Order XX, Rule 18 of the Code of Civil Procedure to the Court for issuing direction to the Collector to the effect that the partition should be effected in a certain manner, in particular, so as to allot as far as possible entire holdings to the share of the plaintiff. This application has been dismissed. On this fact the High Court took the view that the discretion as to the manner in which the partition is to be held lies wholly with the Collector and the Civil Court is functus officio after it declares the shares of the parties and beyond that it is not concerned with that. The Court observed that in fact the suit terminates so far as the Civil Court is concerned on the passing of the preliminary decree affecting any estate assessed to the payment of revenue to the Crown. These observations were made obviously where anticipatory directions to the Collector were sought to require him to effect partition in a particular manner. This case is not an authority for the proposition that if the Collector has effected partition contrary to the decretal mandate his

action is immune from the challenge before a Civil Court. On this question a Division Bench of this Court in [Ningappa Balappa and Ors. v. Abashkhan Gouskhan](#), AIR 1956 Bombay 345, observed as follows :-

"5. It is true that it has been held in several cases that the Court is not entirely deprived of controlling the action taken by the Collector. But this control is very limited. It is to be exercised only if the Collector contravenes the decretal order or transgresses the law relating to partition or refused to execute the decree. See the cases cited at p. 228 of Sir Dinshaw Mulla 's Code of Civil Procedure, 12th Edition."

9. Therefore, the learned District Judge could not have dismissed the appeal on the ground that the Civil Court had no jurisdiction to see if the Collector had acted in accordance or contrary to the decreetal mandate."

35. Per contra, the respondents contend that the orders passed by the Executing Court below Exh.14 and 17 are beyond the scope of its powers as the First Appellate court has modified the decree by its judgment and even if the Executing Court has passed orders thereby deleting some properties from the decree, the said orders have no significance. It is further canvassed that all the litigating sides can raise their objections before the Collector as regards the partitioning of the suit properties. The Collector is competent to consider their objections. Merely because some portions of the suit property have been sold and the judgment debtors have been granted orders u/s 14 and 17, would not mean that the Executing Court can continue to

amend the decree on the basis of such application.

36. While opposing the civil applications for intervention filed by some of the parties as they have purchased the properties after the litigation came into existence, the respondents submit that this would be an endless exercise and would encourage unscrupulous buyers to purchase litigation properties and create obstacles in the path of the decree holder. The view expressed by the Hon'ble Apex Court in the matter of Satyawati Vs. Rajinder Singh [2014(1) Mh.L.J. 624] indicates that the Privy Council had observed in 1872 that the difficulties of a litigant in India begin when he has obtained a decree. It was specifically observed in paragraph Nos.13, 14 and 15 as under :-

"13. It is really agonizing to learn that the appellant- decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant- plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of The General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforesaid judgment of the Privy Council in the case of Kuer Jang Bahadur vs. Bank of Upper India Ltd., Lucknow [AIR 1925 Oudh 448], the Court was constrained to observe that "Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained

decrees in accordance with their rights.”

14. In spite of the aforesaid observation made in 1925, this Court was again constrained to observe in [Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors.](#) [(1982) 1 SCC 525] in para 29 that “Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections.....”

15. This Court, again in the case of [Marshall Sons & Co. \(I\) Ltd. vs. Sahi Oretrans \(P\) Ltd. & Anr.](#) [(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that “.....it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time.....”

37. In matters of lis pendence, the Hon'ble Apex Court in the matter of [Kirpal Kaur Vs. Jitender Pal Singh and others](#) (2016(2) Mh.L.J. 542] has concluded that the "Lis" continues so long as a final

decree or order is not been obtained from the Court.

38. I, therefore, find that the impugned order does not call for any interference considering the following aspects :-

[a] The Appellate Court has modified the decree by its judgment and the correction order dated 24/09/1963. This decree has, therefore, attained finality.

[b] By the report submitted by the Tahsildar, the tenancy has been surrendered in 1952.

[c] By the directions of the learned Division Bench of this Court in WP No.1597/2002, the District Collector is to consider the objections of all the sides while resorting to equitable partition.

[d] This Court, vide its order dated 05/09/2007 in WP No.3636/2007, has permitted the litigating sides to put forth their contentions before the Collector who would consider them while carrying out equitable partition.

[e] The Collector would consider the contentions of the decree holder and the judgment debtors before carrying out equitable partition.

[f] All the properties which are within the ambit of the decree as per the judgment of the First Appellate Court, would be subjected to equitable partition strictly as per the decree which has rendered the shares of the plaintiff and the

defendant, final.

[g] The Collector would abide by the directions of the Appellate Court reproduced in paragraph No.19 of this judgment.

39. This writ petition is, therefore, dismissed. Rule is discharged.

40. All pending civil applications by the intervenors need not be entertained as they are purchasers during the pendency of the proceedings and are, therefore, disposed of.

41. While concluding, I record my appreciation for the co-operation extended by the learned Senior Advocates and all learned Counsels appearing in this matter and who agreed to work out this case even on a holiday, so as to conclude the hearing expeditiously.

42. After the pronouncement of this judgment, the learned advocates for the petitioners pray that the interim protection granted be continued. Learned advocates for the respondents opposed the said request.

43. Considering the fact that the decree of 1956 is yet to be executed and taking into account the fact that the Hon'ble Apex court has granted six months time to this Court to decide this

petition, I do not find any reason for which the request made by the petitioner could be accepted. Hence, the request is rejected.

(RAVINDRA V. GHUGE, J.)