

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2386 OF 2018

KASTURABAI NAVAL PATIL DIED AND OTHERS
VERSUS
BHAVRAO ZAVARU PATIL

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Advocate for Petitioners : Shri U.S.Malte.

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 09th March, 2018.**

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PER COURT :-

1] The petitioners/original defendants have challenged the following orders in this Writ Petition filed on 14/02/2018 :

(a) Order dated 02/07/2013 below Exhibit 28 in Miscellaneous Civil Application No. 57/2009.

(b) The order dated 01/07/2015 in Regular Darkhast No. 60/2009 below Exhibit 59.

(c) The order dated 12/12/2017 in Regular Darkhast No. 60/2009.

(d) Proclamation dated 05/01/2018 putting one property to auction sale.

2] I have heard the strenuous submissions of the learned Advocate for the petitioners. With his assistance, I have gone through the petition paper book.

3] So far as the orders dated 02/07/2013 and 01/07/2015 are concerned, I am not entertaining this petition since those orders have been passed in the presence of these petitioners who have accepted the said orders without any grudge. They are not subjected to challenge in any proceedings for the past between 3 to 5 years. It appears that it is only because of the proclamation for public auction dated 05/01/2018, that these petitioners have challenged all the earlier orders after a span of about 5 years.

4] So far as the order dated 12/12/2017 is concerned, the petitioners contend that the property which is decreed in a preliminary decree, has been put to auction without there being any final decree. Though the judgment of the Trial Court (Original date of Judgment is 19/06/2009 at page No.16) in RCS No. 13/2001 has been sustained by this Court, the plaintiffs have not moved the Court for seeking a final decree.

5] The Trial Court, while decreeing the suit, has declared that the plaintiff and defendant Nos. 1 to 5, who are the petitioners herein, are the only heirs of the deceased Mathurabai. The plaintiff Bhavrao is held to be entitled for half share and these petitioners are jointly held to be entitled for half share from the share of the deceased Mathurabai in the suit property which is described in paragraph No. 2 of the plaint. Partition of the agricultural land is directed to be effected equitably by the Collector, Jalgaon or any other Gazetted Sub-ordinate Officer as per the decree. There are two house properties bearing Nos. 4093 and 4344/A. These house properties are also to be partitioned by the appointment of the Court Commissioner and possession of the separate share is to be given to the plaintiff.

6] It is informed that so far as the agricultural land is concerned, the same has been partitioned and there is no grievance of the litigating sides on that count. The record reveals that even the house property No. 4093 has been partitioned and the plaintiff has filed a purshis on record in the

execution proceedings that he has received the portion of the house which has come to his share.

7] The issue, therefore, is with regard to the house property CTS No. 4344/A. For the past 9 years, these petitioners have not objected to the execution proceedings bearing Miscellaneous Civil Application No. 57/2009 and Regular Darkhast No. 60/2009 which have been merged under the order of the Court dated 11/02/2014. The plaintiff as well as the defendants have participated in the said proceedings for the past about 9 years and the defendant has, therefore, never taken a stand that the decree with regard to any of the properties has not been converted into a preliminary decree and hence cannot be put to execution.

8] To the extent it was convenient and acceptable to these petitioners that, they have accepted the partitioning of the agricultural lands as well house No. 4093. It is for the first time that these petitioners are contending that the auction of house No. 4344/A cannot be permitted as there is no final decree. The intention and motive of these petitioners behind

the stand is obvious from the record.

9] A Court Commissioner was appointed and all the litigating sides co-operated keeping in view the directions in the decree that the Court Commissioner would effect the partition of the house properties. The Court Commissioner completed the exercise and submitted a report that house property No. 4093 has been partitioned and house No. 4344/A cannot be partitioned. Same is not partible and it is not practically possible to partition the said property. It is, in this backdrop, that the auction has been ordered. The order to auction this house property was passed on 23/06/2015. For about 2 ½ years these petitioners did not challenge the said order. Ultimately when the said house property is being put to auction, they have claimed that the order dated 12/12/2017 is perverse and erroneous.

10] Considering the above and after keeping in view the entire facts recorded as above whereby these petitioners have agreed to the partition of the rest of the suit properties, I do not find that the impugned order can be termed as perverse or

erroneous merely because a different view can be taken. Thus, the petition being devoid of merit is, therefore, dismissed.

11] The learned counsel for the petitioners submit that the application filed on 03/09/2015 is still pending and these petitioners pray that the said application may be dealt with by the Court below, urgently. It is made clear that this Court would not wish to express any opinion about the said application considering the dismissal of this petition.

(RAVINDRA V. GHUGE, J.)

shp/-