

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

WRIT PETITION NO. 6892 OF 2015

KONDAJI WAKHAJI BRAHMNE DIED THOROUGH LRS
YOHAN S/O KONDAJI BRAHMANE

VERSUS

MARKAS WAKHAJI BRAHMNE DIED THROUGH LRS
LUKAS MARKAS BRAHMNE AND OTHERS

...

Advocate for Petitioner : Mr. Pathan Yunus Basheer

Advocate for Respondents : Kazi Sabahat T.

...

CORAM : V.K. JADHAV, J.

Dated: April 17, 2018

...

PER COURT :-

1. Heard finally with consent at admission stage.
2. By way of this writ petition, the petitioner/original judgment debtor has challenged the order passed by the Executing Court below Exh.133 in Pending Regular Darkhast No.396 of 2005 dated 23.4.2015.
3. Brief facts, giving rise to the present writ petition are as follows :-
 - a] The respondent/decreed holder had instituted the suit bearing Regular Civil Suit No.196/1981 for declaration, partition and separate possession in respect

aaa/-

of the land gat no.228 and land gat no.968 of village Loni, Tq. Rahata, Dist Ahmednagar. Trial Court has decreed the said suit in terms of the prayer clause as per the relief claimed by the respondent/deGREE holder and said decree has attained the finality. Respondent/deGREE holder has therefore filed Regular Darkhast no.396/2005 for execution of the said decree. Initially the executing court in terms of the provisions of Section 54 of the Civil Procedure Code forwarded the said decree to the Collector for partition of an undivided share as per the decree. In terms of the said order passed by the Executing Court, precept has been sent to the Collector and accordingly the Collector has effected the partition in respect of the suit land gat no.228. On 5.1.1989 the Collector, Ahmednagar has submitted a report to the Executing Court to the effect that in terms of the provisions of Section 8AA of the Maharashtra Prevention of the Fragmentation and Consolidation of Holdings Act, 1947 (for short hereinafter referred to as 'act of 1947'), the land gat no.968 admeasuring 42 Guntha only is impartible. The learned Collector,

Ahmednagar has submitted a report to the Executing Court on the basis of the report submitted by the Deputy Superintendent of Land Records, Ahmednagar wherein the District Superintendent of Land Records, Ahmednagar has specifically informed to the Collector that, in view of the bar of the provisions of the Act of 1947, the land gat no.968 is impartible. The learned Judge of the Executing Court by order dated 12.8.1994 has passed the order below Exh.1 and thereby appointed the Tahsildar as Commissioner for fixation of the price of the land gat no.968 and further directed the decree holder to pay the commission fees and process fees. In terms of the said order, the concerned Tahsildar has conducted inquiry and submitted the report to the Court on 25.8.2000. By letter dated 6.10.2000 Tahsildar, Rahata has submitted a report to the Executing Court communicating therein the market price of the land gat no.968 and said report and fixation of the price was not challenged by any party.

4. However, respondent/Decree holder has filed an

application exh.133 before the Executing Court in the pending Darkhast stating therein that the petitioner/judgment debtor are taking irrigated crops in the aforesaid land gat no.968 and said land no more remained as dry land and, as such, the bar as created under the provisions of the Act of 1947 cannot be made applicable to the land gat no.968. Respondent/decreed holder has specifically contended in the said application exh.133 that land gat no.968 now being a bagayat land can be partitioned in terms of the decree passed by the civil court which has attained finality. The learned Judge of the executing court, by impugned order dated 23.4.2015 below exh.133 in RD No.396/2005 allowed the said application and sent precept to the Collector under section 54 of the Civil Procedure Code to partition the land gat no.968 as per the decree passed by the Court. Hence, this writ petition.

5. Learned counsel for the petitioner/original judgment debtor submits that, there is no provisions under the Maharashtra Prevention of the Fragmentation

and Consolidation of Holdings Act 1947 to show that if the land is irrigated one, bar of fragmentation is not applicable to such a land. Learned counsel submits that, in terms of the provisions of Section 8AA of the Act of 1947, when Civil Court has exercised the jurisdiction directing the Tahsildar to fix the price and submit the report, in terms of subsection (3) of Section 8AA of the Act of 1947, all the questions relating to apportionment of the compensation shall be decided by the Court executing the decree in accordance with the provisions of Sub Section (3) of Section 8AA of the Act of 1947. Learned counsel submits that the impugned order is thus liable to be quashed and set aside with directions to the executing Court to dispose of the pending Darkhast in terms of the provisions of Section 8AA subsection (2) clause (a), (b), (c), (d), and (e) read with subsection (3) of section 8AA of the Act of 1947.

6. Learned counsel for respondent/decreed holder submits that, in terms of provisions of subsection (3) of Section 8AA of the Act of 1947, all questions relating to

the partition of the land and apportionment of the compensation can also be decided by the Collector effecting the partition as the case may be in accordance with the provisions of subsection (2) and as such, order passed by the Executing Court is proper, correct and legal. No interference is required.

7. On careful perusal of the Record and proceedings, it appears that, decree passed in R.C.S. No.196/1981 has attained the finality for which Regular Darkhast No.396/2005 came to be filed before the Executing Court. Initially, even though, decree was sent for partition to the Collector as provided under section 54 of the Civil Procedure Code, on 5.1.1989 the Collector, Ahmednagar has reported to the Executing Court that in terms of the remarks passed by the Deputy Superintendent of Land Records, Ahmednagar, land gat no.968 is not impartible. On perusal of the said report submitted by the Deputy Superintendent of Land Records, Ahmednagar, it appears that, in terms of the provisions of the Act of 1947, the Deputy

Superintendent of Land Records, Ahmednagar has submitted the report to the Collector that considering the area of the land gat no.968, land is impartible as bar of fragmentation operates. It further appears that, in terms of the said report, the learned Judge of the Executing Court has passed the order below exh.1 in the pending Darkhast directing the Tahsildar for fixation of the price of the land which is reported to be impartible due to the bar of fragmentation as per the provisions of the Act of 1947. It is thus clear that, the executing court has decided to consider all the questions relating apportionment of the compensation in respect of the land gat no.968. It is not out of place to mention here that in terms of the original precept sent to the Collector, under section 54 of the Civil Procedure Code, another land gat no.228 came to be partitioned amongst the parties as per the decree passed by the Civil Court and, possession was also delivered as per their respective shares. However, thereafter, respondent/decreed holder has filed an application exh.133 stating therein that the petitioners

are taking Bagayat crops in the land gat no.968 and, as such, bar of fragmentation as per the Act of 1947 is inapplicable and that this land gat no.968 can be partitioned as per the decree passed by the Civil Court. After going through the provisions of the Act of 1947 with the able assistance of the learned counsel for the parties, I do not find any such provision under the Act of 1947 which contemplates that bar of fragmentation is inapplicable to the irrigated land or the land which is initially is a dry land converted into irrigated land subsequently. In absence of any such provision, if the bar as created under the provisions of Act of 1947 operates as it is, there was no reason for the executing court to send the decree under section 54 of Civil Procedure Code to the Collector for partition of the land gat no.968 again.

8. Thus, the question arises as to what course of action is expected from the executing court while disposing of the said pending Darkhast. Thus, recourse can be taken to section 8AA of the Act of 1947 which

reads as under :-

(8AA.) Restriction on partition of land -

(1) Where, by transfer, decree, succession or otherwise, two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed, and the land has to be partitioned among them, such partition shall be effected so as not to create a fragment.

(2) Where such partition is made by the Court or the Collector, the following procedure shall be adopted:—

(a) If, in effecting a partition among several co-sharers, it is found that a co-sharer is entitled to a specific share in the land and cannot be given that share without creating a fragment, he shall be compensated in money for that share. The amount of compensation shall be determined so far as practicable in accordance with the provisions of section 23 of the Land Acquisition Act, 1894.

(b) If, in effecting a partition, it is found that there is not enough land to provide for the shares of all the co-sharers in accordance with the provisions of sub-section (1), the co-sharers may agree among themselves as to the particular co-sharer or co-sharers who should get the share of land and which of them should be compensated in money. In the absence of any such agreement, the co-sharers to whom a share of land can be provided and those to whom money compensation should be given shall be chosen by lot in the manner prescribed.

(c) The compensation shall be payable by each co-sharer in proportion to the excess value of land he gets over the share of land legally due to him, and such co-sharer shall deposit the proportionate amount of compensation in the manner prescribed before taking possession of the share allotted to him. On his failure to do so, his share shall be allotted to any other co-sharer to whom land has not been previously allotted and who is chosen in the manner provided in clause (b) subject to the payment of similar compensation to the co-sharers not getting shares of and.

(d) If none of the co-sharers to whom land has been allotted under clause

(c) pays the compensation and takes the share, the share shall be sold in auction to the highest bidder, and the purchase money shall be paid to the co-sharers not getting land in proportion to their respective shares.

(e) Where the parties agree upon any other method of partition which will not result in the creation of a fragment, that method shall be followed in effecting partition.

(3) Where a partition is effected in execution of a decree all questions relating to the partition of the land and appointment of compensation shall be decided by the Court executing the decree or by the Collector effecting the partition, as the case may be, in accordance with the provisions of sub-section (2).

9. In terms of the provisions of subsection (2) clause

(a) to (e) of section 8AA of the Act of 1947, executing

aaa/-

court can decide all the questions relating to the partition of the land and apportionment of the compensation.

10. In view of the above, the order impugned in this writ petition is liable to be quashed and set aside with certain directions. Hence, following order.

O R D E R

- I. Writ Petition is hereby partly allowed.
- II. The impugned order dated 23.4.2015 passed by Civil Judge Junior Division, Rahata below exh.133 in R.D. No.396/2005 is hereby quashed and set aside with the following directions :-
 - a] The Executing Court shall dispose of the pending Darkhast on the basis of the price fixation done by the learned Tahsildar, Rahata or otherwise considering the increase in the price in respect of the land gat no.968 and in terms of the provisions of section 8AA Sub Section (2) clause (a) to (e) read with subsection (3) of the Act of 1947.

III. The Executing Court shall dispose of the pending Darkhast within three months from the date of this order.

IV. With these directions as above, writ petition is disposed of. No costs.

(V.K. JADHAV, J.)

...