

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

WRIT PETITION NO.8104 OF 2018

Kusum w/o Arvind Dhole & another ... Petitioners

Versus

Malti w/o Sureswh Dhole & others ... Respondents

Mr.S.S.Dixit, Advocate for the Petitioners.

Mr.K.N.Shermale, Advocate for Respondents No.1 to 3.

Coram : N.M. Jamdar, J.

Date : 30 November 2018.

Oral Order :

1. Heard learned counsel for the parties.
2. By consent of the parties, respondents no. 4 to 9 stand deleted.
3. By the impugned order, the learned Civil Judge has allowed the application filed by respondents-decree holders and directed that as per the report of the Court Commissioner, the house

property be partitioned. The application was opposed by the petitioners on the ground that the decree passed is a preliminary decree and not a final decree. The learned Civil Judge has dealt with this objection as under :

7. In the present case in hand the decree in RCS No. 212/2012 is preliminary decree. So far as, house property is concerned as ratio laid down in Apparao's case so also as per Order 20 Rule 18 of the Code of Civil Procedure, the final decree application is required to be applied by decree holders but the ratio laid down in Judgment in Renu Devi's case of the Hon'ble Supreme Court, this darkhast is to the fag end i.e. wherein the Court Commissioner has been appointed and he has filed his report. The suit property is house property wherein there are half share each of the parties. So practical purposes of this darkhast is the final. So the objection of judgment debtors cannot be accepted. So prayer made in this application is required to be allowed therefore following order is passed.

4. Thus the finding of the Civil Judge is in view of Order XX Rule 18 of the Code of Civil Procedure, final decree application is required to be applied by the respondents-decree holders, however, in view of law laid down in the case of *Renu Devi Vs. Mahendra Singh*

*and others*¹, since the darkhast is filed and the Court Commissioner is appointed, the decree needs to be executed. It is also stated that for all practical purposes, this darkhast is final.

5. Since the learned Civil Judge has decided this matter relying solely on the decision in *Renu Devi*, it will be appropriate to refer to the observations in paragraphs nos. 8 and 9 of the decision, which read thus :

8. *A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the future inquiries conducted pursuant to the preliminary decree the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. (See CPS by Mulla Vol. 1, 1995 Edn., page 21). The distinction between preliminary and final decree is this : a preliminary decree*

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merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

9. *In the case at hand, a perusal of the decree dated 13-2-1978 and the contents of the compromise application with the three schedules of properties annexed thereto shows that the property was partitioned by metes and bounds; not only the shares but the property actually falling to the share of each of the 3 groups were actually defined and given to the party entitled thereto. The decree dated 13-2-1978 demarcates the properties forming subject-matter of partition by metes and bounds. For all practical purposes the decree dated 13-2-1978 was a final decree. Order O. XX, R. 18 of the C.P.C. it is not necessary to pass a preliminary decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Often such are the cases which are based on compromise. The present one is such a case. However, still one of the*

parties sought for a final decree being drawn up. The Court and the parties acted under the misapprehension that the decree dated 13-2-1978 was a preliminary decree and, therefore, a final decree was needed to be drawn up. As we have already stated the final decree dated 24-5-1979 is nothing but a reproduction of the schedules contained in the preliminary decree dated 13-2-1978. The only difference is that the decree dated 24-5-1979 is engrossed on stamp papers which the decree dated 13-2-1978 was not.

The Apex Court has interpreted the provisions of Order XX Rule 18 of the Code of Civil Procedure and has held that ordinarily, preliminary decree merely declares rights. An exception to this rule is when a preliminary decree for all practical purposes is a final decree. In the case of *Renu Devi* there was a compromise. Apart from a compromise, there could be various circumstances which may lead to the conclusion that for all practical purposes, a preliminary decree in a given case can be treated as a final decree.

6. This would require an inquiry into the record. Perusal of the impugned order shows that no such inquiry has been made. The learned Civil Judge has only referred to the decision of *Renu Devi* and, has directly applied the same. So that the contention of

respondents-decree holders that the present case, in view of the facts, there is no need to issue a final decree which is only a formality is not prejudiced, it is necessary that the learned Civil Judge is directed to decide the matter afresh after giving an opportunity to the parties and to consider upon verification of the record, whether in the present case, the preliminary decree is to be treated as good as a final decree, to deviate from the general rule under Order XX Rule 18 of the Code of Civil Procedure.

7. Accordingly, writ petition is disposed of setting aside order dated 27 June 2018. The learned Civil Judge will decide the application below Exhibit 23 afresh in the light of above observations. Considering the fact that the proceedings are is pending since long, the learned Civil Judge will expedite disposal of the proceeding and dispose of the application Exhibit 23 within a period of four weeks from today. The parties shall appear before the learned Civil Judge on 5 December 2018 at 10.30 am. The learned Civil Judge will fix further time table of disposal of this application.

N.M. Jamdar, J. A