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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.13317 OF 2016.

Shevanta Keshav Gharge-Deshmukh
and ors

... Petitioners

V/s.

Appaso Namdeo Gharge and ors

... Respondents

Mr. Mahendra B. Deshmukh, for the
Petitioners.

Mr.Dilip Bodake, for respondent Nos. 1 to 8

Mr. Avinash B. Patil, for the Respondent
No.9.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 1st FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the petitioners and learned
counsels for the respondents.

2] By this writ petition filed under 227 of the Constitution of
India, the petitioners are challenging the order dated 14.9.2016,
passed below Exh.87 by the Court of Jt.Civil Judge Junior
Division,Vita, in Regular Darkhast No.11 of 2011.

3] Application at Exh.87 was filed by the present petitioners
contending inter alia that the present Execution Proceeding is in
pursuance of decree of partition passed on 26.09.1994 in
R.C.S.No.152 of 1992. As per said decree, respondent Nos 1 to 8 are

the Decree Holders. They have been allotted $\frac{1}{4}$ th share together in the joint family properties, including house and agricultural lands. They have filed this execution proceeding for separation of their shares. It is the contention of the petitioners that they being co-owners and co-sharers they are also entitled to get their $\frac{1}{4}$ share together and $\frac{1}{4}$ th share of petitioner No.5 to be separated and delivered to them in this Executing Proceeding itself.

4] It is submitted that the trial Court has, however, rejected their application, holding that they have no right to get such partition of their shares as they have not paid necessary Court Fee stamp. Submission of learned counsel for the petitioners is that they are ready to pay such Court fee stamp, on their shares and therefore, their shares be separated in the present execution proceeding.

5] Learned counsel for respondent No.9, who was original defendant No.2 has pointed out that respondent No.9 has also filed application in Regular Darkhast No.7 of 1998, which was filed earlier by the Decree Holder and in that Execution Proceeding, the order was passed directing the Collector, while effecting partition, to hand over possession of defendant No.2's share in the property to him alongwith handing over the possession of share to decree holders, on payment of necessary Court fee stamp.

6] In view thereof, in considered opinion of this Court, as

regards the petitioner Nos 1 to 4, there is no difficulty in directing the Executing Court to issue possession warrant of their $\frac{1}{4}^{\text{th}}$ share together, which is not disputed, in respect of house properties and agricultural lands by effecting partition, according to provisions of law, on payment of requisite Court fee stamp.

7] As regards, petitioner No.5, however, he has filed separate suit bearing R.C.S.,No.28 of 2017 for partition and separate possession of his $\frac{1}{4}^{\text{th}}$ share in the joint family properties, contending inter alia that there are some other joint family properties also which were not included in the earlier suit. Now in view thereof, as he is having separate stand and separate suit, it would not be appropriate to direct the executing Court to hand over his separate share in the present Execution Proceeding. Though this Court has specifically asked learned counsel for the petitioners whether petitioner No.5 wants to withdraw his suit, so that his share can also be separated in the present Execution Proceeding, learned counsel for petitioners has submitted that the petitioner No.5 wants his suit to proceed in respect of remaining joint family properties which were not the subject matter of earlier suit. Now such piecemeal decree of partition cannot be ordered in this Execution Proceeding. Therefore, his prayer for partition of his share in the suit properties stands dismissed.

8] However, as regards petitioner Nos. 1 to 4, trial Court is directed to issue possession warrant as regards their $\frac{1}{4}^{\text{th}}$ share together in the house properties and in the agricultural lands. As regards partition of house property, the share of respondent Decree Holder is already separated, as possession warrant is executed on 6.1.2017, his separate share need not be disturbed. Petitioner Nos. 1 to 4 are entitled to get the partition and separate possession of their $\frac{1}{4}^{\text{th}}$ share together only in remaining house properties, on payment of necessary Court fee stamp.

9] The claim of petitioner No.5 to get partition and separate possession of suit properties in this execution proceeding itself stands rejected in view of his filing separate suit for partition, in which according to him, some additional joint family properties are also included. The writ petition is disposed of in above terms.

10] Needless to state that as regards, original defendant No.2 who is present respondent No.9, as the trial Court has already allowed him relief of partition of his $\frac{1}{4}^{\text{th}}$ share, in this proceeding, he will also be entitled to get his share partitioned in both, the remaining house properties and agricultural lands, on payment of Court fee stamp.

[DR.SHALINI PHANSALKAR-JOSHI, J.]