

((1))

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

CIVIL REVISION APPLICATION NO.36 OF 2019

Smt. Laxmibai w/o Babarao Barde,
Age 76 years, Occ. Agri. & Household,
R/o Peth Shivani, Tal. Palam,
District Parbhani,
Through G.P.A.- Waman Babarao Barde,
Age 42 years, Occ. Agril.,
R/o as above.

... APPLICANT
(Orig.Judgment Debtor)

VERSUS

1. Gayabai w/o Deorao Sontakke,
Age 70 years, Occ. Household,
R/o Peth Shivani, Tal. Palam,
District Parbhani
2. Laxmibai Sadashivrao Landage,
Age 75 years, Occ. Household,
R/o as above.
3. Kamalbai Sadashivrao Landage,
Age 68 years, Occ. Household,
R/o as above.
4. Ramesh Sadashivrao Landage,
Age 48 years, Occ. Business,
R/o as above.

... RESPONDENTS
(Orig. Plaintiffs)

.....
Shri P.R. Katneshwarkar, Advocate for applicant
Shri V.V. Bhavthankar, Advocate for respondents
.....

CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 13th September, 2019

Date of pronouncing judgment : 20th September, 2019

J U D G M E N T :

Rule. Rule returnable forthwith and heard finally with the consent of learned counsel appearing for the parties.

2. The challenge in this revision application is to the order passed by Civil Judge, Junior Division, Palam, on 18/1/2019. By the impugned order, the application preferred by the present applicant for dropping of execution proceedings in an application, being Misc. Civil Application No.1/2019, came to be rejected.

FACTS

3. One Narayan Barde died, leaving behind his widow – Gangabai and three daughters, namely Laxmi, Gayabai and Kamladevi. On Narayan's demise, his widow Gayabai and the three daughters inherited his agricultural lands and the house property. Laxmibai and Gayabai filed the suit (Regular Civil Suit No.52/1975) for partition and separate possession against Kamlabai, Gangabai, one Ramesh and Laxmibai. The Court of Civil Judge, Junior Division, Gangakhed decreed the suit. The

defendant No.1 Laxmibai preferred first appeal against the judgment and decree passed in the said suit. Learned Assistant Sessions Judge, Parbhani dismissed the appeal, however, modified shares of respondent No.1, 2 and 4 in the suit property. The Second Appeal was preferred to the High Court. The Second Appeal was allowed, confirming the judgment and decree passed by the trial Court.

4. Gayabai preferred application, being Misc. Application No.1/1998 for execution of the decree passed in the suit, (Regular Civil Suit No.52/1975). The said application was dismissed in default on 2.1.2002. An application was preferred for restoration of the application for execution, dismissed in default. The said application too came to be rejected in November 2007. Thereafter, Gayabai filed Regular Darkhast (No.46/2007) (New No.48/2008), asking for issuance of a precept to the Collector, for execution of the decree passed in (Regular Civil Suit No.52/1975).

5. The applicant herein preferred application (Exh.128) in the said proceedings and prayed for dropping of the execution proceedings. A copy of the said application is on record. It was averred in the said application that when application for restoration

of the execution proceedings, dismissed in default, was dismissed and no appeal was preferred thereagainst, the said order became final for all the times to come. Reliance was placed on the provisions of Order XXI Rule 106 of the Code of Civil Procedure. The Executing Court rejected the said application by the order impugned in this revision application.

6. Shri Katneshwarkar, learned counsel for the applicant first adverted my attention to provisions of Order XXI Rule 10. Relying on the said provision, the learned counsel would submit that, when the decree holder desires to execute it, he shall apply to the Court who passed the decree or to the officer, if any, appointed in this behalf. According to learned counsel, Gayabai accordingly preferred the application in view of Rule 10 way back in 1998. The said application was dismissed in default in view of Rule 105(2). Rule 106 provides that the applicant, against whom an order is made under Rule 105(2) of Order XXI, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance, when the application was called for hearing, the Court shall set aside the order with such terms as to costs or otherwise, as it thinks fit.

The application preferred under Rule 106 came to be dismissed. No further proceedings were taken to the higher forum. As such, the order dismissing the application for execution of the decree attained finality. Gayabai was, therefore, precluded from moving a fresh application for execution of the decree. Learned Advocate also took me through Article 136 of the Limitation Act to contend that, for execution of a decree, limitation period provided for its execution is 12 years.

7. The learned counsel cannot be heard on the point of limitation since the same was not raised in application Exh.128. Even otherwise also, the submissions made by the leaned counsel for the revision applicant are unsustainable in law.

Learned counsel would further submit that, if any other course is adopted, the statutory provisions contained in Order XXI Rule 105 and 106 would remain dead letters. Learned counsel ultimately urged for allowing the revision application.

8. Order XX Rule 18 of the Code of Civil Procedure reads thus :

“18. Decree in suit for partition of property or

separate possession of a share therein :- Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, –

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Section 54 of the Code of Civil Procedure reads as under :

“54. Partition of estate or separation of share :

Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for

the time being in force relating to the partition, or the separate possession of shares, of such estate.”

9. After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share, is to apply for a final decree. Such an application is not one for execution. There is, in fact, no limitation for such an application, since the rule does not contemplate any such application being made by the party, it being the duty of the Court to pass the final decree.

10. In case of **Shub Karan Bubna @ Shub Karan Prasad Bub Vs. Sita Saran Bubna & ors.**, reported in **AIR 2009 (Supp) 2863**, the Hon'ble Supreme Court has observed that, an application filed by plaintiff in a suit for partition after passing of preliminary decree for drawing up of final decree is not subject to any period of limitation.

11. In case of **Bikoba Deora Gaikwad & ors. Vs. Hirabai Marutirao Ghorgare & ors.**, reported in **2008 AIR SCW 4264**, it has been held, where decree was declaring shares of respective parties, and parties were asked to get land partitioned through Collector and house property partitioned through Commissioner,

then decree passed is not final decree and application made under Section 54 of the Civil Procedure Code to send decree to Collector is only a step towards passing of a final decree which is not execution application, and hence, no period of limitation would apply.

12. The decree passed in the suit (Regular Civil Suit No.52/1975) directs that a copy of the decree be sent to the Collector under Section 54 of the Civil Procedure Code.

13. In view of the settled legal position, as stated above, the decree passed in the suit (Regular Civil Suit No.52/1975) was a preliminary decree. It was to be sent to the Collector for passing a final decree. That job was expected to be done by the Court itself. The Misc. Application No.1/1998 preferred in that regard can, by no stretch of imagination, be termed to be an application for execution of the decree. No fixed period of limitation has been prescribed for moving an application for final decree. The submissions advanced by the learned counsel for the applicant are inconsistent with the law laid down by the Apex Court. The submissions of the learned counsel cannot, therefore, be accepted. The reliance placed on the judgment of the Supreme

Court in the case of **Damodaran Pillai & ors. Vs. South Indian Bank Ltd.** in Civil Appeal No.1079/2004 has no application to the facts of the present case. The facts of Damodaran Pillai's case (supra) indicate that it was a money decree. Necessarily provisions of Order XX Rule 18 and Section 54 of the Code of Civil Procedure do not apply to a money decree. Whereas provisions of Order XXI Rule 105, 106 do apply to a proceeding initiated for the execution of money decree.

14. Learned Civil Judge, Junior Division has passed a well reasoned order. In view of the aforesaid legal proposition, to which the learned Judge has relied upon, for rejecting the application Exh.128, no interference is called for in the impugned order, rejecting the application Exh.128. Civil Revision Application is rejected. Rule discharged.

15. On the request of learned counsel for the applicant, interim relief to continue for the next three weeks.

(R.G. AVACHAT)
JUDGE

fmp/-