

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6642 OF 2014

Kalba s/o Gunaji Jadhav
Age 58 years, Occ. Agriculture
R/o. Asarjan,
Tq. and District Nanded

...Petitioner
(Ori. Deft. No.1)

versus

1. Seetabai w/o Gunaji Jadhav
(Since deceased through L.Rs.)
Shersing s/o Hirasingh Fouji,
Age 50 years, Occ. Business,
R/o. Badpura, Nanded
District Nanded
2. Kerabai w/o Laxman
Age 67 years, Occ. Household
R/o. Amdura, Tq. & Distr. Nanded
3. Sarjabai w/o Munjaji,
Age 60 years, Occ. Household
R/o. Bhanpur, Tq. & Dist. Nanded
4. Girjabai w/o Deorao kale
Died through her L.Rs.
- 4A. Damaji s/o Deorao Kale
Age 50 years, Occ. Agriculture
R/o. Kawatha, Tq. & Dist. Nanded
- 4B. Sakharam s/o Deorao Kale
Age 45 years, Occ. Agriculture
R/o. As above
- 4C. Tukaram s/o Deorao Kale,
Age 36 years, Occ. Agriculture
R/o. As above
- 4D. Renuka d/o Deorao kale
Age 43 years, Occ. Household
R/o. As above

(Ori. Plaintiff)

5. Deorao s/o Sambha
Age 67 years, Occ. Agriculture
R/o. Kawatha, Tq. & Dist. Nanded

...Respondents
(R. No. 2 to 5 Ori. Deft. 2 to 5)

.....
Mr. A. G. Godhamgaonkar Advocate for Petitioner
Mr. A. S. Deshmukh Advocate for respondent No.1
Mr. S. V. Kurundkar Advocate for respondents 4-A to 4-D
.....

CORAM : V. K. JADHAV, J.
DATED : 13th NOVEMBER, 2019

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally at admission stage.
2. Respondent No.1 deceased Seetabai had instituted R.C.S. No. 312 of 1979 against the respondents including the present petitioner for partition and separate possession in respect of the house and landed properties. The learned Joint C.J.J.D. Nanded, by judgment and decree dated 21.3.1983 decreed the suit and respondent-deceased Seetabai was given share in the landed property. The said share was modified to some extent in Regular Civil Appeal No. 151 of 1983. However, the decree was confirmed in second appeal No. 242 of 1986 by this Court, by judgment and order dated 02.08.1988. In terms of the decree confirmed in the second appeal by this Court, the respondent-original plaintiff-deceased Seetabai had 2/5th share i.e. 40% share in the suit property. The respondent No.1-original plaintiff-deceased Seetabai had filed one execution petition bearing Regular Darkhast No. 167 of 1989, which was made over to the Court of Joint C.J.J.D. Nanded. In that Darkhast, deceased

Seetabai had prayed for partition and her separate share in the house property and landed properties, having survey No. 58 admeasuring 2H 96 R, survey No. 11 admeasuring 0 H 38 R, land survey No. 7 admeasuring 0 H 32 R situated at Asarjan, Tq. Nanded, survey No. 9 admeasuring 4 H 32 R situated at Dhanapur, survey No. 5/A admeasuring 2 H situated at Fatehjangpur, Tq. Nanded, survey No. 29/1/2 admeasuring 0 H. 81 R and survey No. 29/7/2 admeasuring 1 H 5 R situated at Kawtha, Tq. Nanded. Apart from these properties, there were three house properties, as detailed in the execution petition. The respondent original plaintiff decree holder deceased Seetabai had prayed in the said Darkhast to transfer the decree to the office of the Collector, Nanded under Section 54 of the Code of Civil Procedure, 1908. Meanwhile, for partition of the house properties, an application was moved and one Court Commissioner was appointed, who submitted his report vide Exh.15 in R.D. No. 167 of 1989.

3. It is the case of respondent No.1 deceased Seetabai that she was never called by the Collector in connection with the decree sent to him and even the trial court did not wait till receipt of the final report of partition of the landed properties from the Collector and disposed of the Darkhast at once. It is the contention of the respondent decree holder deceased Seetabai that she yet to receive the share in the property. The respondent decree holder deceased Seetabai had therefore, filed an application bearing R.J.E. No. 173 of

2002 requesting therein to call final report from the District Collector, Nanded about compliance of the decree sent to him in R.D. No. 167 of 1989 in pursuance to the judgment and decree in respect of R.C.S. No. 312 of 1979 and confirmed with some modification in Regular Civil Appeal No. 151 of 1983 and in Second appeal No. 242 of 1986.

4. Initially, by impugned order dated 23.12.2011 the learned 8th Joint C.J.J.D. Nanded has issued notice to the District Collector, calling report from him for compliance of the decree sent to him for effecting the partition in execution proceeding No. 167 of 1989 and by impugned order dated 26.07.2013 directed the District Collector, Nanded to effect partition of the suit property as per the order passed in Regular Darkhast No. 167 of 1989 and directed that the certified copy of the decree in respect of the Regular Darkhast No. 167 of 1989 in respect of landed property be sent to the Collector, under Section 54 of C.P.C. Being aggrieved by the same, the original defendant No.1-judgment debtor has preferred this writ petition.

5. Learned counsel for the petitioner submits that the total acreage of landed properties out of the properties, which are subject matter of the aforesaid suit, comes to 11 H 84 R and respondent-decree holder deceased Seetabai had share to the extent of 4 H 73 R. The respondent decree holder Seetabai had filed execution petition bearing R.D. No. 167 of 1989 and executing court had

transferred the decree to the District Collector, Nanded under Section 54 of the C.P.C. for partition and separation of share. Learned counsel submits that R.D. No. 167 of 1989 filed in connection with R.C.S. No. 312 of 1979 came to be disposed of long back prior to passing of the order dated 23.12.2011 by the learned Judge in R.J.E No. 173 of 2002. The learned Judge has passed the impugned orders in connection with disposed of R.D. No. 167 of 1989 after a period of more than 12 years after passing of the decree. Learned counsel submits that the Deputy Superintendent of Land Records, Nanded as per the entry taken in the measurement register No. NDMR/5021/1992 dated 28.9.1992 and 30.9.1992 complied with the decree as per Darkhast No. 167 of 1989 and submitted a report to that effect to the District Collector, Nanded. Even by communication dated 9.9.2014 Exh.77 the District Collector, Nanded has informed to the Court and also annexed the copy of the panchnama dated 30.9.1992 which bears thumb impression of respondent decree holder deceased Seetabai and other judgment debtors about compliance of the decree. Even statements about the separation of share has been recorded and mutation entry No. 440 came to be effected. Learned counsel submits that it is an admitted position that the respondent No.1 original decree holder deceased Seetabai even sold the said lands to the various persons from her share in the partition decree. Learned counsel submits that the trial court has not taken cognizance of all these documents submitted for perusal by the Collector, Nanded. Learned counsel submits that both the impugned

orders are thus liable to be quashed and set aside and this writ petition deserves to be allowed.

6. Learned counsel for respondent No.1 Seetabai, who died during pendency of this writ petition and she has been substituted by one Shersingh Fouji as her legal heir after due enquiry by the court below as directed by this Court, submits that in terms of the order passed by the executing Court dated 23.12.2011, the learned Collector, Nanded has informed to the Court that record in respect of R.D. No. 167 of 1989 was not found in his office. Learned counsel submits that deceased Seetabai/decreed holder did not receive the fruits of the decree. The District Collector, Nanded has not submitted final report pursuant to the compliance of the decree sent to him in R.D. No. 167 of 1989. Learned counsel submits that the learned Judge of the executing Court has therefore, rightly passed the impugned orders. There is no substance in this writ petition and this writ petition is liable to be dismissed.

7. I have also heard the learned counsel for other respondents i.e. respondent Nos. 4-A to 4-D, who has adopted the submissions made on behalf of the petitioner.

8. On 1.9.2017, this Court dealt with civil application No. 5080 of 2017 filed by the applicant therein viz. Shersing Hirasing Fouji claiming to be the legal heir of decreed holder deceased Seetabai on

the strength of registered will deed executed in his favour. The said Shersingh had filed the said civil application for bringing him on record in the writ petition as the legal representative of deceased Seetabai. The petitioner in the writ petition strongly resisted the said application. By order dated 1.9.2017, this Court has referred the question about legal heir-ship, as to who is the legal heir of deceased Seetabai to the trial/executing Court and further directed the trial court to decide the same according to Order XXII Rule 5 of C.P.C. and return the papers of the said enquiry alongwith the finding and reasons.

9. On perusal of the record and proceedings, it appears that said Shersingh Fouji filed R.J.E. No. 631 of 2017 before the trial court. The petitioner had filed say at Exh.19 and strongly resisted the said application. Furthermore, respondent 4-A to 4-C also resisted the application by filing their say at Exh.22. Both the parties led their oral and documentary evidence in support of their rival contentions and learned 8th Joint C.J.J.D. Nanded, by order dated 16.10.2018 below Exh.1 in R.J.E. No. 631 of 2017 allowed the said application with finding that applicant is the legal representative of deceased Seetabai. During the course of hearing of said R.J.E. No. 631 of 2017 certain documents came to be placed before the Court and those are duly exhibited. On perusal of the said documents at Exh.77 alongwith annexures, I find much substance in this writ petition.

10. It is the case of the petitioner that original decree has been duly satisfied in R.D. No. 167 of 1989. Even thereafter, the decree holder deceased Seetabai had executed registered sale deed No. 2271/2004 in favour of one Avinash Venkatrao Patil R/o. Shrinagar in respect of the property, which came to be allotted to her share under decree, for consideration of Rs.7,50,000/- on 17.4.2004. It is also the case of the petitioner that deceased Seetabai had submitted false application bearing R.J.E. No. 173 of 2002 during her life time and the civil court was constrained to call final report from the Collector about execution of the decree, which is already disposed of.

11. Though I find a communication sent by the District Collector, Nanded dated 4.4.2013 to the 8th Joint C.J.J.D. Nanded, Exh.48/C, informing to the Court that the office of the Collector had received the R.C.S. No. 312 of 1979 and R.D. No. 58 of 1983. By the very same letter, it was also informed that by letter dated 12.10.1983 the office of the Collector had requested the Court to send the check list. It was also informed that R.D. No. 58 of 1983 was sent back to the court on 29.08.1989. Further, the learned District Collector, Nanded has also informed that the papers pertaining to R.D. No. 167 of 1989 are not available. However, the possibility of initially filing R.D. No. 58 of 1983 cannot be ruled out. It is the matter of record that the decree was finally confirmed in the second appeal by this court on 02.08.1988. However, the learned Judge of the executing Court has

considered the said letter as incorrect information pertaining to R.D. No. 58 of 1983.

12. As discussed above, during the course of enquiry of R.J.E. No. 631 of 2017 filed by the legal heir Shersingh Fouji, who has been substituted as legal heir of deceased Seetabai, certain communications and documents are received from the District Collector, Nanded. The said letter dated 9.9.2014 sent by the District Collector, Nanded is marked at Exhibit 77. On careful perusal of the same, it appears that the Deputy Superintendent of Land Records, Nanded has complied with the decree as per the R.D. No. 167 of 1989 and there is also entry to that effect in the measurement register No. NDMR/5021/92 dated 28.9.1992 and 30.9.1992 about the said compliance. Even the panchnama dated 30.9.1992 is also annexed to the said communication Exh.77 about delivery of possession to deceased Seetabai. The said panchnama also bears her thumb impression. It has been specially mentioned in the communication dated 7.8.2014 with outward No. 1331 by the Deputy Superintendent of Land Records, Nanded about the compliance of decree as per the order passed in R.D. No. 167 of 1989 under Section 54 of the C.P.C. and it also reflect from the panchnama that the land survey Nos. 7,9,11, 29 and 58 in terms of the decree passed in R.C.A. No. 151 of 1983 and R.C.S. No. 312 of 1979 (subject matter of the present writ petition) and in R.D. No. 167 of 1989, came to be inspected and partition has been effected and the decree

holder put in separate possession of the share as per the decree. It has been specifically mentioned in the said panchnama that deceased Seetabai was present during the said measurement. Furthermore, the partition table (*Watap Takta*) also came to be prepared by surveyor Mr. N.N. Munde. A report to that effect came to be submitted to the District Superintendent of Land Records, Nanded. Even the copies of the said partition table (*Watap Takta*) are also annexed to the said communication. Furthermore, the mutation entry No. 440 came to be effected in connection with the R.D. No. 167 of 1989 as per the partition table (*Watap Takta*) referred above. As per the said partition table (*Watap Takta*), the name of the decree holder deceased Seetabai came to be mutated in respect of the lands as mentioned in the said partition table (*Watap Takta*). Furthermore, the copy of sale deed is also annexed to the said communication and on perusal of the same, it appears that deceased Seetabai sold the land Gat No. 120 admeasuring 2 H 34 R to the extent of her share to one Avinash Venkatrao Patil under registered sale deed for consideration of Rs.7,50,000/- on 17.4.2004. The relevant 7x12 extract is also part of record wherein the name of deceased Seetabai was appearing in the ownership column so also in the cultivation column. The mutation No. 440 as per the court decree has been referred in the 7x12 extract. Learned counsel for respondent No.1 has failed to submit any explanation for the same and learned counsel has repeatedly made submissions that the District Collector, Nanded has not submitted final report. It appears

that those documents, as discussed above, came to be produced before the Court during the course of enquiry pertaining to the legal heir-ship of applicant Shersingh Fouji in RJE No. 631 of 2017 and as such, in the impugned orders the learned Judge of the executing Court has not mentioned about the same. The impugned orders came to be passed before the said enquiry of R.J.E. No. 631 of 2017.

13. In view of the discussion above, this writ petition deserves to be allowed. Hence, I proceed to pass the following order:-

O R D E R

- I. Writ petition is allowed in terms of prayer clauses "C" and "D".
- II. Rule made absolute in the above terms.
- III. The writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

rlj/