

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

WRIT PETITION NO.13163 OF 2019

Pramod s/o Dattatraya Kand,
Age : 61 years, Occu. : Business,
R/o : Plot No.111, Revikarnagar,
Savedi, Ahmednagar,
Tq. & and Dist. Ahmednagar.

. . . . PETITIONER

VERSUS

Sow. Sudha Krishna Kand,
Age : 70 years, Occu. : Nil,
R/o : Jeevanprem housing Sosa.,
B Wing Flat No.5, Second Floor,
Pachpakhadi Gurukul Road,
Thane (W).

. . . . RESPONDENT

...

Shri L.B.Palod, Advocate for the petitioner.
Shri M.S.Kulkarni, Advocate for the respondent.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 13th November, 2019

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The petitioner is the judgment debtor, who is aggrieved by the order dated 07.09.2019 passed by the Executing Court, by which, the application exhibit 24 filed by the respondent/ decree holder in Final Decree Application No.3 of 2014 seeking appointment of a court

commissioner, has been partly allowed.

3 It would be appropriate to reproduce the operative part of the impugned order hereunder :-

- "1) *Application is allowed.*
- 2) *Legal practitioner is hereby appointed as court commissioner.*
- 3) *Both the parties shall file joint pursis regarding the name of Advocate.*
- 4) *Commissioner is directed to visit the suit property and submit his proposal as to how the decree can be executed and as to how one half share can be given to D.H.*
- 5) *Commissioner is directed not to put D.H. directly in possession of one half portion of the suit property.*
- 6) *D.H. shall bear the commissioner fees.*
- 7) *If there is no consensus regarding the name of commissioner, the Court will appoint the commissioner."*

4 There is no dispute that the original plaintiff is the wife of the real brother of the petitioner. She preferred Special Civil Suit No.55 of 2007 seeking declaration and possession over the suit house property. The suit was decreed by judgment dated 25.06.2008, by which, the original plaintiff and the petitioner/original defendant, were given half share of the house property.

5 It is undisputed that both the litigating sides challenged the decree dated 25.06.2008 in a regular civil appeal and cross objection, which were dismissed by the judgment dated 06.12.2012. As such, both the parties were held to be entitled to equal shares in Plot No.111 in

Survey No.11, in so far as the house property is concerned. Both preferred Second Appeal Nos.578 of 2013 and 581 of 2013 before this Court and both the Appeals are pending. By an order dated 21.03.2016, the Second Appellate Court recorded that the Appeals would be decided on the substantial question of law as to whether, the Courts below have committed an error in not considering the material given by the defendant as proof for the execution of the Will?

6 The contention of the plaintiff is that though she and her father-in-law (father of the present petitioner/defendant) are shown to be the joint owners of the property, it was the plaintiff, who had paid the entire consideration for purchasing the said plot. Subsequently, her father-in-law prepared a Will, which came to the knowledge of the parties after he passed away. Purportedly, half share is given to the defendant and half share is given to the plaintiff. The plaintiff has claimed the entire share as she claims to have purchased the said plot entirely from her money and neither her husband nor the petitioner, who is the real brother of her husband, have spent any amount. The petitioner/ defendant claims that the entire property belongs to him.

7 Civil Application No.5381 of 2017 was filed by the original plaintiff/Decree Holder seeking orders from this Court. On 09.06.2017, this Court (Coram : N.W.Sambre, J.) has passed the following order:-

“In view of the provisions of Order XLI Rule 5 of the

Code of Civil Procedure, the learned Counsel for the applicant does not press the application, as it is expected of the executing Court to take note of the provisions of Order XLI Rule 5 of the Code of Civil Procedure. As such, Civil Application stands disposed of.”

8 Order XLI Rule 5 of the Code of Civil Procedure reads as
under:-

- “Stay of proceedings and of execution*
5. *Stay by Appellate Court—*
- (1) *An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.*

[Explanation—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.]

- (2) *Stay by Court which passed the decree—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.*
- (3) *No order for stay of execution shall be made under*

sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) [Subject to the provisions of sub-rule (3)], the Court may make an ex parte order for stay of execution pending the hearing of the application.

[(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.] ”

9 During the course of the submissions of the learned Advocates, it is stated unanimously that the decree at issue is a preliminary decree and being a house property, conversion to a final decree will be by appointing a Court Commissioner, who would visit the site and decide as to how the property can be shared between the two parties. He would not have the authority to put the parties in possession of their shares divided by metes and bounds unless specifically directed by the Executing Court.

10 The Honourable Supreme Court has dealt with the issue of such division of properties, when it comes to converting a preliminary

decree into a final decree, under paragraph 18 in the matter of ***Shub Karan Bubna Alias Shub Karan Prasad Bubna Vs Sita Saran Bubna and others, (2009) 9 Supreme Court Cases 689***. It would be apposite to reproduce paragraph 18 hereunder:-

“18. The following principles emerge from the above discussion regarding partition suits:

- 18.1. In regard to estates assessed to payment of revenue to the Government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of the Code. Such entrustment to the Collector under law was for two reasons. First is that the Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of the government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible.) Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.*
- 18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is, buildings, plots, etc. or movable properties:*
 - (i) where the Court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.*
 - (ii) where the division by metes and bounds cannot be made*

without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed. (usually an engineer, draughtsman, architect, or lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

- 18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is, division by metes and bounds takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.”

11 It is thus, obvious and does not call for any debate as to how the property at issue will have to be divided by metes and bounds and that the order of this Court dated 09.06.2017 clears all impediments in the path of the Executing Court in proceeding with the execution proceeding.

12 The decree holder/plaintiff had initially filed an application Exhibit 17 on 21.10.2016 seeking an order of appointment of a Court Commissioner. The said application was rejected on 04.01.2017 as the Second Appeals were pending. The decree holder then preferred exhibit 21 on 21.09.2017 after this Court passed its order on 09.06.2017, seeking appointment of a Court Commissioner. The Executing Court, while rejecting Exhibit 21, agreed with the procedure of law as to how the property at issue will have to be divided and appointment of Court Commissioner would be necessary. However, Exhibit 21 was rejected by concluding that the property could be divided after the decree is converted into a final decree and until then, the execution proceeding cannot proceed. Apparently, the said conclusion, though not challenged by the plaintiff, is quite strange and which runs counter to the principles carved out by the Hon'ble Apex Court in paragraph 18.2 in ***Shub Karan Bubna (supra)***.

13 The strenuous contention of the petitioner, while assailing the impugned order, is that as exhibit 21 was rejected by the Executing Court, rightly or wrongly, exhibit 24 suffers from *res-judicata*. He has placed

reliance upon the judgment of the Hon'ble Apex Court in the matter of ***Bhanu Kumar Jain Vs. Archana Kumar and another, 2005(2) Mh.L.J. 839*** in which, it has been held that *the principles of res-judicata would also apply to the different stages in the same proceeding*. He, therefore, canvassed that the rejection of Exhibit 21 renders Exhibit 24 untenable.

14 This is a peculiar case, in which, the rejection of exhibit 21, which is apparently in opposition to the tenets of law keeping in view that the principles culled out in ***Shub Karan Bubna (supra)***, is sought to be canvassed as being an impediment in the path of the plaintiff in filing Exhibit 24. This controversy, however, would not detain me in considering Exhibit 24 in view of the apparently misconceived observations of the Executing Court in the last paragraph in the order dated 21.11.2017, by which, Exhibit 21 was rejected. The Executing Court misdirected itself in presuming that the plaintiff desires the implementation of the decree. He lost sight of the fact that the proceedings were for converting a preliminary decree into a final decree. Insofar as the principles of law are concerned, there is no debate between the learned advocates representing both the sides as regards the procedure to be adopted. The said procedure is crystallized by the Hon'ble Apex Court in ***Shub Karan Bubna (supra)***.

15 I find from application exhibit 24 that the plaintiff has sought

the appointment of a Court Commissioner within the framework of law. In my view, the rejection of exhibit 21 on a misconceived footing, which is diagonally opposite to the principles culled out by the Honourable Supreme Court in *Shub Karan Bubna (supra)*, would not be an impediment to entertain exhibit 24, lest an order based on misconception would result in denying justice to the parties.

16 In view of the above, I find that the directions issued by the Executing Court at Clause 2, 4 and 5 reproduced above, are in tune with the procedure laid down in law. Considering the judgments delivered by the Honourable Supreme Court with regard to the supervisory jurisdiction of this Court in the matters of *Syed Yakoob Vs.K.S.Radhakrishnan and others [AIR 1964 SC 477]* and *Surya Dev Rai Vs. Ram Chander Rai [2003(6) SCC 682]*, the impugned order cannot be termed as being perverse or erroneous or likely to cause gross injustice to the petitioner.

17 This Writ Petition being devoid of merit is, therefore, dismissed. Rule is discharged.