

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 277 OF 2019

Vishwas Dattatray Athare

...Petitioner

Versus

The District Magistrate/District Collector,
Collector Officer, Ahmednagar

...Respondent

ALONG WITH
CIVIL APPLICATION NO. 522 OF 2019

IN

WRIT PETITION NO. 277 OF 2019

Hasan s/o Babu Zarekari

...Applicant

Versus

The District Magistrate/District Collector,
Collector Officer, Ahmednagar

...Respondent

ALONG WITH
CIVIL APPLICATION NO. 740 OF 2019

IN

WRIT PETITION NO. 277 OF 2019

Rahul S/o Ganesh Pawar

...Applicant

Versus

Vishwas Dattatray Athare and Anr

...Respondents

Mr. Amit A. Yadkikar, for Petitioner and Respondent No. 2 in both Applications.

Mr R. N. Dhorde, Senior Counsel i/by Mr V. R. Dhorde, for the Applicant-Intervenor in CA/522/2019.

Mr. N.V. Gaware, h/f Mr. S.P. Salgar, for the Applicant in CA/740/2019.

Mr. V.S. Badakh, AGP for Respondent No. 1.

**CORAM : PRASANNA B. VARALE &
S.M. GAVHANE, JJ.**

DATE : JANUARY 14, 2019

ORDER:

1. The present petition is filed at the instance of Petitioner who is the Court receiver vide order dated 04.03.2002 below Exh.128 in RCS No. 50/2012 (Old no. Sp.C.S. 436/1988).

2. The principal prayer in the petitions are as:

a. This Hon'ble Court may kindly issue, a writ of Mandamus or any other appropriate writ, order or directions in the nature of Writ of Mandamus and direct the Respondent to give the Petitioner i.e. appointed Court Receiver an opportunity of hearing during the proceedings in Regular Darkhast No. 57/1977;

b. This Hon'ble Court may kindly issue, a writ of Mandamus or any other appropriate writ, order or directions in the nature of Writ of Mandamus and direct the Respondent to not pass any order(s) in Regular Darkhast No. 57/1977 without hearing the Petitioner;

3. It is submitted before this Court that the petitioner was appointed as Court receiver vide order dated 04.03.2002. On 28.02.2005 the petitioner has taken possession of the suit properties

owned and possessed by a partnership firm namely Chandan Estate which is a party in RCS No. 50/2012. It is submitted that Survey Nos. 53/1B, 113/3, 52/1 and 52/1 are the properties owned and possessed by Chandan Estate, which are now in the custody of the Court receiver through the petitioner as Court Receiver. Then it is submitted that petitioner came to know about the execution proceedings i.e. Regular Darkhast No. 57/1997 pending before the Respondent. Petitioner sought permission to intervene in the execution proceedings. Permission was granted to the petitioner and accordingly petitioner approached the respondent authority seeking audience by way of an application to the party. It is submitted that in spite of permission granted to the petitioner, Respondent authority was not granted an opportunity of hearing to the petitioner. Again, petitioner approached Respondent authority on 20.12.2018 but the respondent authority declined to hear the petitioner as such, the present petition is before this Court.

4. Heard learned Counsel appearing for the respective parties at length. Civil applications were allowed and the applicants were heard through their respective parties.

5. It is not in dispute that there is a chequered history to the

proceedings and the proceedings were initiated in the year 1956. The proceedings in relation to Survey Nos. 52/1, 52/2, 53/1B, 133, 133/3 and 46/2, situated in the area of Tq and Dist. Ahmednagar. Special Civil Suit No. 13/1956 was decided and decreed by the Competent Court. Being aggrieved by the decision First Appeal Nos. 78/1958 and 79/1958 were filed. The decree was modified under the order of the High Court dated 24.09.1963. Pursuant to the modified decree, initially Darkhast No. 06/1965 was filed, however, it was disposed off. On 30.04.1977, legal heirs of the plaintiff in Sp.C.S. 13/1956 filed a Special Darkhast No. 57/1977. During the pendency of the said darkhast, the decree holdner no. 2 assigned his $\frac{3}{4}$ share in six land bearing no. 47/6, 48/6, 53/1B, 133/3, 52/1 and 52/2 to one Hasan Babu Zarekari on 01.10.1981.

6. Being aggrieved by the order dated 07.01.2008 passed by the learned Civil Judge, S.D., Ahmednagar in Special Darkhast No. 57/1977 and the order dated 24.12.2007 passed by the Respondent Authority, Writ Petition No. 276/2008 was filed before this Court praying that the Civil Court be directed to sent corrected precept u/s 54 of the Civil Procedure Code to the respondent herein, incorporating the modifications made by this Court in First Appeal Nos. 78/1958 and

79/1958 and the orders subsequently passed by the Civil Court.

Initially this Court decided Writ Petition No. 276/2008 vide order dated 12.06.2008, the said order was challenged by some of the parties before the Division bench of this Court under LPA which modified the decree. As such, plaintiff no. 3 and others approached the Hon'ble Apex Court. By order dated 02.08.2017, the Hon'ble the Apex Court has set aside the judgment passed in LPA as well as the learned Single Judge and remanded the matter back.

7. It is the submission of learned Counsel appearing for the Petitioner that though, the petitioner was appointed as Court Receiver, the parties failed to implead the petitioner in the proceedings either before this Court or before the Hon'ble the Apex Court and when the fact of filing of R.D. No. 57/1977 for execution came to the knowledge of petitioner, the petitioner approached the Respondent authority and sought for grant of opportunity of hearing but the respondent authority did not paid any heed to the petitioner as such, the directions are sought for by way of the prayers.

8. Learned Senior Counsel appearing for the Applicant-Interver vehemently opposed the petition and submitted that the petitioner is

having a very limited role in the proceedings. By inviting our attention to the various orders and more particularly, a detailed judgment and order passed by the learned Single Judge of this Court, learned Senior Counsel submitted that by the judgment and order of the learned Single Judge the proceedings are now concluded and the petitioner has to play a very limited role before this Court i.e. only with an object of frustrating the order of learned Single Judge whereby the proceedings are reached at the stage of finality.

9. On hearing the learned Counsel appearing for the respective parties and on going through the material placed on record, we are of the opinion that there is no merit in the petition.

10. As stated above, it is not in dispute that there is a checkered history of proceedings in respect of certain properties situated in the area of Tq and Dist. Ahmednagar. We find considerable merit in the submissions of learned Senior Counsel that the petitioner who is appointed as Court Receiver has to play a very limited role in the proceedings and he is custodian of the properties involved in a civil proceedings. Learned Senior Counsel was justified in making the submission before this Court that the petitioner had exceeded his limits.

It would not be out of place to state that the petitioner is not limiting himself as a custodian or caretaker of the properties but is acting in over enthusiasm as if the petitioner is neither litigant nor contesting party in the proceedings. It may not be necessary for us to refer voluminous documents placed on record including the orders in the first appeals by this Court, the order passed by the Hon'ble the Apex Court as this facts are not disputed.

There is also considerable merit in the submission of learned Senior Counsel that the attempt of the petitioner by approaching this Court in the present petition seeking direction to the Respondent authorities i.e. revenue authorities who is in the process of consideration of quasi judicial proceedings is nothing but an attempt to prolong the proceeding which has reached at the stage of finality. It is also not in dispute that the litigating parties are at liberty to avail remedies as available under law for establishing their civil rights but such a right is not available to the petitioner who is Court Receiver.

11. As stated above, it may not be necessary for us to refer to the various orders in a long drawn proceedings and we may refer only to the relevant observations of the learned Single Judge in the judgment and

order dated 27th March, 2018 in Writ Petition No. 276/2008. The learned Single Judge had already referred to the status of the litigant parties, the relationship between the parties, the proceedings at various levels and in various legal forum. It would be useful to our purposes to refered to only relevant observations of the learned Single judge, those are reproduced as follows:

18. The Appellate Court specifically recorded that the extensive contentions and defences of the defendants are not required to be taken into account as only defendant no. 7 Sakharam Mahadev Misal and defendant no. 8 Ramchandara Gopinath Misal have appealed to the High Court. As such, the litigation for seeking a share in the property in between the plaintiffs and the defendants is brought to an end, save and except, the claim of defendant nos. 7 and 8.

19. The Appellate Court then concluded that the names of these Misal brothers appear for the first time in the revenue records after Mahibubbhai's death. These Misal brothers claimed that the portions of land held by them are in their possession for about 9 years after the demise of Mahibubbhai. Hence, the Appellate Court specifically observed as under:

"We accordingly direct that the decree declaring the

respective shares of the several parties be and is hereby confirmed, that the properties S.No. 47/6, 53/1-B, 52/1, 52/2 and 50/4 and the house properties be equitably partitioned so that, as far as possible, defendant no. 1 is assigned the whole survey numbers which have been purchased by defendant nos. 7 and 8. In the event of such a partition not being possible, the Court will assign as much land out of these two survey numbers to defendant no. 1 as is possible in consideration of her share in the house and other lands. As to the rest of the share the plaintiff will be entitled to reasonable compensation from defendants 7 and 8.

In order to do effective justice between the parties in this proceeding without driving them to further litigation in Tenancy Court, we direct the Lower Court to refer to the Mamlatdar, during the time that the partition proceedings are pending, the two following issues to be determined by him. The issues will be:

[1] Whether defendant no. 7 proves that he was a tenant of Mahibubbhai and/or a tenant of the suit land S.no.52/1 and 52/2 and whether the tenancy is binding on the first plaintiff?

[2] Whether defendant no. 8 is a tenant of the suit land bearing S.No. 53/1-B and whether the tenancy is binding on the first plaintiff?

This inquiry will go on simultaneously with

the enquiry regarding partition. The decision on these issues will not have any practical importance if equitable partition can be effected by the Lower Court. There will be no order as to costs.”

12. Then in paragraph 20, the order dated 24.09.1963 of the Appellate Court is referred to. Following are the observations of the learned Single judge same reads as under:

21. *The learned Advocates for the petitioners have canvassed before me that the tenancy issue is not closed and is still open. Notwithstanding the observations of the Hon'ble Apex Court in the order dated 02.08.2017 concluding that “there was a surrender of tenancy in the year 1952 as found by the Mamlatdar” and the observations of the Appellate Court that “in order to do effective justice between the parties in this proceedings without driving them to further litigation in Tenancy Court”, the petitioners have argued that as an appeal has been filed against the report of the Tahsildar before the Collector, the issue of tenancy is still open.*

22. *I cannot accept the contentions of the petitioners that the issue of tenancy is subjudice before the Collector. The Appellate Court had specifically ruled that the parties now would not be driven to further litigation in*

the Tenancy Court and hence it ordered that the Lower Court would refer the matter to the Mamlatdar only to cause an enquiry as to whether the tenancy rights of defendant nos. 7 and 8 are alive or not. It is thus obvious that the Appellate Court did not desire that the two issues framed by it vide its judgment dated 02.05.1963, should relegate the parties to further litigation in the Tenancy Court. The Appellate Court, therefore, framed the 2 issues and directed the Civil Court to refer the matter to the Tahsildar. The Tahsildar received the papers and the issue referred, which are registered as Kool Kaida Case No. 5/2004 on 13.04.2005. It noted the directions of the Appellate Court and the issue cast and concluded that defendant no. 7 Sakharam Misal and defendant no. 8 Rambhau Misal have voluntarily relinquished their rights or claims flowing through the tenancy in relation to land S.No. 52/1, 52/2 and 53/1-B in 1952. It is specifically observed that these 2 defendants have voluntarily surrendered the tenancy. (Emphasis supplied)

28. Learned Advocates for the petitioners and the interveners counter this submission by stating that a preliminary decree can be modified in the light of reported judgments of the Hon'ble Apex Court. So also, if such a decree cannot be modified, then Hasan Babu

Zarekari would be out of the Court as he has been arrayed as a decree holder alongwith Mahadu Pawar in the light of the order passed by the Executing Court on application Exhibit 21 on 09.03.1998. If Zarekari can be added as a decree holder in darkhast proceedings, the same analogy can be made applicable and the orders dated 21.12.1981 on Exh. 14 and 17, will have to be made a part of the precept. So also, these two orders dated 21.12.1981 have not been challenged by the decree holders in the past 36 years.

29. I find that after the precept was sent to the District Collector, there was a controversy in between the parties that the orders passed by the Executing Court below Exh.Nos. 14, 17, 21 and 22 did not find place in the precept. The petitioners contended that the District Collector should refer the matter to the Civil Court for correction in the precept. By order dated 25.08.2006, the District Collector concluded that as these petitioners did nto take steps pursuant to the orders below Exh. 14, 17 and 21, the precept cannot be corrected by the District Collector. He, therefore, declined to delete S.Nos. 46/2 and 131 from the precept. He, however, deleted S.Nos. 48/6 and 50/4.

32. The Executing Court, while rejecting the application filed by the J.D. Nos. 13 and 22 and the

purported third parties to the execution proceedings, has observed as under:-

- [a] The decree has been modified by its predecessor as per directions in the judgments delivered by the High Court in Appeal No. 78/1958 and 79/1958.*
- [b] The judgment debtor, who lost the litigation at the first appellate stage, had approached the Hon'ble Apex Court which dismissed their SLP both, on the ground of delay as well as on merits on 04.12.2006.*
- [c] Under such circumstances, there is no necessity to modify the decree.*
- [d] The Division Bench of this Court has held in WP No. 1597/2002 that all contentions of the parties can be raised in execution proceedings before the Collector and the Collector can adjust the equities to the extent it would be possible.*
- [e] Considering the law laid down by the Hon'ble Apex Court in Khemchand Shankar Choudhary Vs. Vishnu Hari Patil [AIR 1983 SC 124], if decree is sent for partition of estate or separation of shares, a transferee, during the pendency of the partition can appear in such proceedings and claim equitable partition even though they were not parties to the suit.*

[f] As the record is sent to the Collector and the Collector is executing the decree, it is necessary for him to comply with the directions of the High Court in WP No. 1597/2002 and submit his compliance report to the High Court.

36. While opposing the civil applications for intervention filed by some of the parties as they have purchased the properties after the litigation came into existence, the respondents submit that this would be an endless exercise and would encourage unscrupulous buyers to purchase litigation properties and create obstacles in the path of the decree holder. The view expressed by the Hon'ble Apex Court in the matter of *Satyawati Vs. Rajinder Singh* [2014 (1) Mh.L.J. 624] indicates that the Privy Council had observed in 1872 that the difficulties of a litigant in India begin when he has obtained a decree. It was specifically observed in paragraph nos. 13, 14 and 15 as under:

"13. It is really agonizing to learn that the appellant – decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant – plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of The General Manager of the Raj Durbhnga under the

Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in the case of Kuer Jang Bahadur Vs. Bank of Upper India Ltd. Lucknow [AIR 1925 Oudh 448], the Court was constrained to observe that “Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtor in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.”

14. *In spite of the aforestated observation made in 1925, this Court was again constrained to observe in Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors. [(1982) 1 SCC 525] in para 29 that “Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections.....”*

15. *This Court, again in the case of Marshall Sons*

& Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. & Anr. [(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that “.... it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time....”

38. *I, therefore, find that the impugned orders does not call for any interference considering the following aspects:-*

[a] The Appellate Court has modified the decree by

its judgment and the correction order dated 24.09.1963. This decree has, therefore, attained finality.

- [b] By the report submitted by the Tahsildar, the tenancy has been surrendered in 1952.*
- [c] By the directions of the learned Division Bench of this Court in WP No. 1597/2002, the District Collector is to consider the objections of all the sides while resorting to equitable partition.*
- [e] The Collector would consider the contentions of the decree holder and the judgment debtor before carrying out equitable partition.*
- [f] All the properties which are within the ambit of the decree as per the judgment of the First Appellate Court, would be subjected to equitable partition strictly as per the decree which has rendered the shares of the plaintiff and the defendant, final.*
- [g] The Collector would abide by the directions of the Appellate Court reproduce in paragraph no. 20 of this judgment.*

40. All pending civil applications by the intervenors need not be entertained as they are purchasers during the pendency of the proceedings and are, therefore, disposed of.

13. Thus, what is reflected from the order of the learned Single Judge is to achieve the object of finality to the proceedings. The learned Single Judge declined to entertain the civil applications by intervenors who were the purchasers of property during the pendency of the proceedings in furtherance of the object of a finality to the long drawn proceedings. In the affidavit in reply the respondent has specifically raised the ground of an attempt to prolong the proceedings and a limited role of the petitioner and same reads thus:

2. At the outset I say that, the petitioner has not disclosed the true and correct facts and has suppressed the material facts from this Hon'ble Court on this ground itself the Writ Petition is liable to be dismissed. I say that, petitioners have filed the present petition with dishonest intention to prolong the execution proceedings and raising all the frivolous contentions to see the Collector is not allowed the function properly and the present intervener who is the decree holder is deprived of the fruits of the decree. I say that, the present petitioners have raised disputed questions of facts and therefore, the same is liable to be dismissed with heavy cost.

3. *I say that, the present petitioners have not independent right to raise any objection to the decree since the present petitioners are the purchasers pendent lite during the pendency of execution proceedings and hence, the petitioners have no locus to raise any grievance in respect of the partition proceedings initiated by the Collector. I say that, the decree for partition in Spl.C.S. No. 13/1956 is passed on 30.09.1957 and thereafter the decree is confirmed the First Appeal No. 79/1958 by Hon'ble High Court its judgment and decree dated 24.09.1963. I say that, almost 62 years have passed since the decree for partition is passed in favour of the present intervener and his predecessor. However, due to the illegal tactics played by the present petitioners the decree could not be executed till today.*

14. Considering these aspect of the matter, we are of the opinion that the petition is devoid of any merit as such, deserves to be dismissed. Hence, Writ Petition is dismissed accordingly.

(S. M. GAVHANE, J.)

(PRASANNA B. VARALE, J.)