

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

WRIT PETITION NO. 12372 OF 2017

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| <p>Mr.Yashwant Taturam Deshmukh
Since deceased through legal heirs</p> | <p>]</p> | |
| <p>1 Vijay Yashwant Deshmukh
Age 62 years, Occupation Business
Residing at Saibaug Apartment,
B Wing, Second Floor, Room No. 202,
Sanewadi, Post Kulgaon, Badlapur (W),
Taluka Ambernath District Thane.</p> | <p>]</p> | |
| <p>2 Mr.Vilas Yashwant Deshmukh
Age 57 years, Occupation Service
Residing at Jaikisan Apartment,
Near Post office, Room No. 258, Airoli, Navi
Mumbai, Taluka and District Thane</p> | <p>]</p> | |
| <p>3 Mrs. Hirabai Ramakant Hindurao
Alias Savita R. Hindurao
Age 64 years, Occupation Household,
Residing at Shubhvihar Apartment,
C Wing, Room No.202, 2nd Floor, Katrap
Road, Near Gaondevi Mandir, Katrap,
Badlapur (E), Taluka Ambernath, District
Thane.</p> | <p>]</p> | |
| <p>4 Mrs. Rupali Vijay Deshmukh
Age 52 years, Occupation Household,
Residing at Post Gaur Kamat,
Post Vadap, Taluka Karjat,
District Raigad.</p> | <p>]</p> | <p>Petitioners
(Original
Judgment Debtors)</p> |
| <p>Versus</p> | | |
| <p>1. Mr.Gulabrao Shantaram Deshmukh
Age 77 years, Occupation Agriculture
Residing at Chone,
Post Badlapur, Taluka Ambernath,
District Thane.</p> | <p>]</p> | <p>Respondent
(Original Decree
Holder)</p> |

Ms.Gauri Godse for petitioners.

Mr. D.S. Joshi for respondent.

CORAM : N.J. JAMADAR, J.
DATE : 17TH SEPTEMBER 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the learned counsel for the parties, the petition is heard finally.

2. This petition under Article 227 of the Constitution of India takes exception to an order passed by the learned Civil Judge, Junior Division, Ulhasnagar on an application (Exh.17) in Regular Darkhast No.10 of 2011 whereby the leaned Civil Judge allowed the application of the decree-holder and directed to send the decree for effecting partition of the suit land to the District Collector, in accordance with section 54 of Code of Civil Procedure, 1908 ('the Code'), by discarding the objection raised by the petitioners-the judgment debtors.

3. The facts are few and can be summarized as under :-

The respondent-plaintiff-decree holder had filed Regular Civil Suit No.126 of 1974 for partition and separate possession of the agricultural land bearing Survey No.3, Hissa No.1 admeasuring 1 Acre 38 $\frac{1}{4}$ Gunthas and Survey No.102, Hissa No.11, admeasuring 2 Acre 27 Gunthas, situated at Village Chon, Taluka Ambarnath, District Thane (hereinafter referred to as 'the suit property'). The said suit came to be decreed by judgment and order dated 20th August 1980 and it was declared that the plaintiff has $\frac{1}{2}$ share in the suit property. It was further ordered that the decree be sent to the Collector under section 54 of the Code for effecting

the partition. The plaintiff-decree holder had filed Regular Darkhast No.5 of 1989 with a prayer to send the decree for effecting of partition to the Collector. The said execution petition came to be dismissed in default of appearance by the learned Civil Judge, Junior Division, Ulhasnagar by order dated 6th July 1995.

4. The plaintiff-decree holder again moved an application renewing the prayer for sending the decree for partition of the suit property to the Collector by filing Regular Darkhast No.10 of 2011. The judgment debtors-petitioners raised objection to the tenability of the said petition as it was preferred after 16 years of the passing of the order dated 6th July 1995, whereby the earlier execution petition was dismissed. The learned Civil Judge, after hearing the parties, was persuaded to allow the application and send the decree to the District Collector for effecting partition holding, *inter-alia*, that the provisions of Order IX Rule 9 were not applicable to the execution petition and, since it was a decree for partition, it was the duty of the Court to send the decree for effecting the partition to the District Collector.

5. Being aggrieved by and dissatisfied with the said impugned order, the judgment debtors have invoked the writ jurisdiction of this Court.

6. Heard Ms.Godse, the learned counsel for the petitioners and Mr.Joshi, the learned counsel for the respondent.

7. It was submitted on behalf of the petitioners that the executing Court had fallen into an error in allowing the application preferred by the decree holder, despite having noted that earlier execution petition, being Regular Darkhast No.5 of 1989 was dismissed in the year 1995 and the instant application came to be filed after 16 years thereof. It was further submitted that the Executing Court was enjoined to consider and deal with the consequences which emanated from the dismissal of the earlier execution petition. Thus, the impugned order deserves to be interfered with, urged the learned counsel for the petitioners.

8. In opposition to this, it was submitted on behalf of the respondent that the decree holder had merely reminded the Executing Court of its duty to execute the decree for partition. Since a preliminary decree was passed and it was further directed that the decree be sent to the Collector for effecting partition under section 54 of the Code, there was no question of limitation, as it was the duty of the Court to execute the decree, to which the decree holder had invited the Court's attention.

9. The controversy sought to be raised is no longer *res-integra*. It is trite that a preliminary decree (whenever it is necessitated by the facts) merely declares rights or shares of the parties and a final decree is required to be passed to effectively implement the rights crystallized in the preliminary decree. The learned trial Court has rightly placed reliance upon

the judgment of the Supreme Court in the case of **Shub Karan Bubna Alias Shub Karan Vs. Sita Saran Bubna & Ors.**¹ wherein this aspect was elaborately considered by the Supreme Court. The observations of the Supreme Court in paragraphs 18.3, 20, 21 and 22 are of material significance. They read as under :-

“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 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.

.....

20 On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree.

21 A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.

1 (2009) 9 SCC 689

22 Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit. Consequently an application for a final decree in a mortgage suit is different from an application for final decree in partition suits.”

10. The aforesaid pronouncement emphatically underscores that it is the duty of the court to take steps to execute the preliminary decree passed in a suit for partition. The application for final decree as and when made is to be considered as an application in a pending suit for granting the relief of partition of the subject property by metes and bounds. No question of limitation thus arises.

11. In this view of the matter, the submission on behalf of the petitioners that the impugned order is vulnerable as it does not deal with the consequences of the dismissal of the earlier execution petition does not advance the cause to the petitioners as the Court could not have dismissed the said application in default as it was the duty of the Court to pass appropriate orders to execute the decree. Thus, no interference is warranted in the impugned order.

12. The petition stands dismissed. No costs.

Rule discharged.

[N.J. JAMADAR, J.]