

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.849 OF 2017

Deepak Vishwanath Wankhede

Vs.

Sau. Alka w/o Sanjay Jungalay

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri S.M.Patrikar, Advocate for petitioner.

Shri N.R.Bhishikar, Advocate for respondent-sole.

CORAM : A.S.CHANDURKAR, J.

DATED : April 15, 2019

The petitioner is aggrieved by the order passed by the Executing Court below Exhibit 32 dated 15.11.2016 rejecting the application as filed by the petitioner for dismissal of the execution proceedings.

The respondent along with her sister had filed a suit for separation and partition of the house property. The plaintiffs therein were sisters while the defendant was their brother. The Trial Court decreed the suit on 09.03.2009 and declared that each party had one third share in the suit property. Liberty was granted to the plaintiffs to initiate proceedings for having their shares separated. A preliminary decree was accordingly drawn. That decree has been challenged in an appeal which is pending. The decree holders filed proceedings for execution and in those proceedings, the judgment debtor filed an application below Exhibit 32 seeking dismissal of the execution proceedings on the ground that without passing a final decree the same was sought to be executed. By the impugned order the Executing Court has rejected that application.

Shri S.M.Patrikar, learned counsel for the petitioner by relying upon the decision in *Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others, 2007(3)Mh.L.J.56* submitted that unless a final decree was drawn, it was not permissible for the Executing Court to have executed the decree as passed. The decree was with regard to the house property and only the shares of the respective parties had been adjudicated. Without determining the exact share in that property, the same could not be partitioned by filing such execution proceedings. The Executing Court rejected the said application only on the ground that the same was filed belatedly. He further submitted that one of the decree holders had executed relinquishment deed in favour of the petitioner which aspect was also relevant. Without considering the legal position, the objection as raised has been dismissed.

On the other hand, Shri N.R.Bhishikar, learned counsel for the sole respondent supported the impugned order. He submitted that in the execution proceedings a Commissioner had been appointed for demarcation of the shares. The decree being executed was only in terms of the judgment of the Trial Court and it was open for the judgment debtor to object to the manner of partition. He submitted that the Executing Court could take all necessary steps for executing the decree and in that regard he placed reliance on the decision in *Annasaheb Rajaram Nagane & another Vs. Rajaram Maruti Nagane and others, 2001(3)Mh.L.J.53* and submitted that the impugned order does not call for interference.

Heard learned counsel for the parties and perused the documents placed on record. The Trial Court on 09.03.2009 had passed a decree granting one third share each to the

plaintiffs and defendant. Liberty was granted to the plaintiffs to initiate proceedings for having the shares separated. In the execution proceedings the decree holder sought for appointment of the Court Commissioner to effect the partition. The Executing Court allowed the application below Exhibit 23 on 09.04.2016 and directed the Court Commissioner to demarcate the shares. That report is yet to be received by the Executing Court. It is in that context the Executing Court has observed that the relief sought in the execution is based on the decree passed by the Trial Court. It is further observed that the report of the Court Commissioner could be objected to by the judgment debtor.

The provisions of Order XXVI Rules 13 and 14 of the Code of Civil Procedure (for short, the Code) permit the Court after passing of the preliminary decree for partition to appoint a Commissioner to have the shares separated. The procedure to be followed is also stipulated therein. This course has been adopted by the Executing Court and it is thus found that the same is permissible. The respective shares of the parties can be demarcated by the Court Commissioner who has been so appointed. The ratio of the decision in the case of Hashan Abbas Sayyad (supra) relied upon by the learned counsel for the petitioner has to be considered in the facts of that case. The question arising therein was, whether the suit property could be put for execution without initiating final decree proceedings. That aspect does not arise in the present case. As noted by the Executing Court, the judgment debtor can always object to the report of the Court Commissioner after the shares are demarcated. Moreover, the Executing Court was also justified in observing that the objections had been raised belatedly specially when the execution proceedings were filed in the year 2009 and

the Court Commissioner was appointed on 09.04.2016.

It is thus found that there is no jurisdictional error on the part of the Executing Court in dismissing the objections. The writ petition is therefore dismissed. No orders as to costs.

JUDGE

Andurkar.