

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

**SECOND APPEAL NO.119 OF 2018
WITH
CIVIL APPLICATION NO.188 OF 2018**

Shri. Sandip Shivaji Mangale & Anr. Appellants

Vs.

Shri. Madhukar Madhav Kalyankar Respondents
& Anr.

Mr. Prajakt M. Arjunwadkar for Appellants.
Mr. Rohan Kaiche i/by Mr. Anilkumar K. Patil for Respondents.

**Coram : NITIN W. SAMBRE, J.
Date : 20th January, 2020**

P.C.:

1. This Second Appeal is by an objector to a decree for redemption and possession.

2. Based on Exhibit 39, a Mortgage Deed, of which redemption was claimed in a Special Civil Suit No. 139 of 2001 decreed on 31st July, 2001 was put for execution in Special Darkhast No. 128 of 2004.

3. The appellant, an objector under Order 21, Rule 97 claimed to have purchased undivided shares out of suit property on 15th September, 2014 and as such pursuant to the provisions of Section 44 of Transfer of Property Act claimed that the decree for separate possession cannot be executed unless the property is partitioned.

4. Mr. Arjunwadkar submits that Darkhast proceedings are liable to be rejected in view of provisions of Section 44 of Transfer of Property Act and the decree holder is required to be relegated remedy for filing of suit for partition.

5. In the aforesaid background, the question of law, which is sought to be agitated is :

“Whether a decree is executable pursuant to the provisions of Section 44 of the Transfer of Property Act in absence the partition of the property including the suit property?.

6. If the aforesaid background, this Court is required to consider the nature of properties as described in the decree in the light of the pleadings in the plaint. The suit property is specifically described

as under :

१. मिळकतीचे वर्णन — जी.तू. सांगली. तहसील व पो.तु. मिरजपैकी हरिपूर येथील शेेतजमीनी —

अ.नं.	भू.मा.क्र.	क्षेत्र हे. आर.	अ. क. र. रु. पै.
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१.	७४/४	०-३१	३ = ०६
२.	६६/१अ	१-६२	१५ = १९
३.	६६/१ब	१-५४	१४ = ४४

वरील तिन्ही नंबर्समधील २ आणि ८ पै. हिश्याची (० हे. ५८ आर. आकार रु. ५=४५ ची) जमीन त्यातील इले. मोटार व पाण्याच्या पाइपलाइनमधील हक्कांसह व अन्य सोयी आणि तदंगभूत वस्तूंसह.

२ वरील कलम १ मधील जमिनीचा ग हाण फेड दस्त प्रतिवादींनी वादीचे नावाने एक महिनेचे आत उलटवून देणेबाबत हुकूम करूनही प्रतिवादीने त्याबाबत कोणतीही पूर्तता केली नाही. तरी वर नमूद केले जमिनीचा ग हाण फेडदास्त करून देणेबद्दल हुकूम करणेत यावा व वादी. दरखास्तदारास कब्जा देणेबद्दल कब्जेवॉरंट काढणेत यावे अशी विनंती आहे.

7. In the aforesaid background of the decree, which was passed on 1st September, 2004 in Special Civil Suit No. 139 of 2001, a perusal of Darkhast speaks of the execution is being sought by the decree-holder of the very same property to the extent of the joint possession of undivided shares of 58 R. i.e. the suit property.

8. The objector also claims his rights by virtue of sale-deed that too of an undivided share in a joint holding, out of which the suit property is also part.

9. As such, by virtue of execution of decree in Darkhast in question, it can be inferred that the decree is executable to the extent of the joint possession of the suit property, it being undivided share of the parties to the suit. The appellant also claims to be holding undivided shares to the extent of land purchased by him for which he lodged objection under Order 21, Rule 97 of the Code of Civil Procedure.

10. A perusal of the decree speaks of the same is for the joint possession of the undivided share and that being so, in my opinion, a decree is very much executable and the decree-holder need not be relegated to the remedy of filing of partition suit as has been claimed based on provisions of Section 44 of Transfer of Property Act.

11. The law is well settled that the executing Court cannot travel beyond a decree and a decree for the joint possession of an undivided share is very much executable.

12. That being so, while executing such decree, it cannot be inferred that the decree-holder has in any way encroaching upon the right of the objector, when he is holding a joint possession of an undivided share in the suit property.

13. At the most, the present appellant i.e. the objector, if feels so may ask for partition in an independent proceedings, however, his contention that pursuant to Section 44, a decree holder needs relegated remedy for filing partition suit, was rightly rejected by both the Courts below.

14. No question of law involved in the present Second Appeal. The appeal stands rejected.

15. The Executing Court shall proceed ahead with the execution of Special Darkhast No. 128 of 2004 expeditiously.

16. In view of dismissal of the Second Appeal, the Civil Application No. 188 of 2018 does not survive, the same is accordingly disposed of.

(NITIN W. SAMBRE, J.)