

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5413 OF 2020

- 1) Mahadeo s/o Krishna Thavare,
Age 58 years, Occ. Agril.
R/o. Kaudgaon Tq. Paranda,
Dist. Osmanabad.
 - 2) Pramilabai @ Pamabai w/o Krishna Thavare,
Age 84 years, Occupation Agriculture,
R/o. Kaudgaon, Tq. Paranda, Dist.
Osmanabad.
- ... Petitioners.

VERSUS

- 1) Kasudabai w/o Sidheshwar Padule
(died through L.Rs.)
- 1-A) Sakharbai wd/o Dadasaheb Bandgar,
Age 51 years, Occ. Household,
R/o. Aawati Tq. Karmala, Dist.
Solapur.
- 1-B) Sheshrao s/o Sidheshwar Padule,
Age 48 years, occ. Agriculture,
R/o. Kaudgaon Tq. Paranda,
Dist. Osmanabad.
- 1-C) Saraswati @ Sarla wd/o Uttreshwar Bere,
Age 46 years, Occ. Household & Agril.
R/o. Shelgaon (Virache), Tq. Karmala,
Dist. Solapur.
- 1-D) Machindra s/o Sidheshwar Padule,
Age 44 years, Occ. Agriculture,
R/o. Kaudgaon Tq. Paranda,
Dist. Osmanabad.
- 1-E) Gorakh s/o Sidheshwar Padule,
Age 46 years, Occ. Agriculture,
R/o. Kaudgaon Tq. Paranda,
Dist. Osmanabad.
- 1-F) Sidheshwar s/o Sambhaji Padule,

Age 76 years, Occ. Agriculture,
R/o. Kaudgaon Tq Paranda, Dist.Osmanabad.

2. Gayabai w/o Aba Devkar
(died through his L.Rs.)

2-A) Sarubai w/o Harischandra Thavare,
Age 48 years, Occ. Agriculture,
R/o. Kaudgaon Tq. Paranda, Dist. Osmanabad.

2-B) Tulshidas s/o Aba Devkar,
Age 45 years, Occ. Agriculture,
R/o. Kaudgaon Tq. Paranda,Dist. Osmanabad.

2-C) Kamlakar s/o Aba Devkar,
Age 39 years, Occ. Agriculture,
R/o. Kaudgaon Tq. Paranda,Dist. Osmanabad.

3) Prayagabai wd/o Bhagwan Kolekar,
Age 61 years, Occ. Household &
Agril. R/o. Kaudgaon Tq. Paranda,
Dist. Osmanabad.

... Respondents.

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Advocate for the Petitioners : Mr. A. S. Mahajan.

Advocate for the Respondents : Mr. A.S. More.

CORAM	:	MANGESH S. PATIL, J.
RESERVED ON	:	24.09.2021.
PRONOUNCED ON	:	13.10.2021.

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. Learned advocate Mr. More waives service for the respondents. At the request of the parties the matter is heard finally at the stage of admission.

2. The question that crops up for the decision of this Court is as to if even before a decree for partition of agricultural lands is satisfied by its division by metes and bounds as contemplated under Section 54 of the Code of Civil Procedure only some of the sharers can reap the benefits of receiving compensation of some of the suit properties acquired in the mean time

under the Land Acquisition Act, to the extent of their indivisible share as defined in the decree.

3. The facts are not in dispute,

(i) The respondents filed Regular Civil Suit No. 189/1997 for general partition and separate possession of joint family properties consisting of agricultural lands as well as house properties. The suit properties consisted of seven agricultural lands of varied extent collectively admeasuring 26 Hectares and 89 Are. According to decree, the respondents who were originally three in numbers Kasudabai, Gayabai and Prayagabai were held to be entitled to a 1/15th share each in all the suit properties.

(ii). They filed Regular Darkhast No. 8/2011 which is pending before the Executing Court and a copy of the decree was sent to the Collector for effecting partition of the agricultural lands by metes and bounds as is contemplated under Section 54 of the Code of Civil Procedure. The Collector has still not effected any partition by metes and bounds and has not separated shares of the parties.

(iii). In the meanwhile, different portions from five agricultural lands out of the suit properties were acquired by the State Government which was totally admeasuring 18-Hectares 43-Are. The petitioners asserting that in view of the decree the respondents collectively have 1/5th share in the acquired lands and they have the remaining 4/5th, made a Reference (L.A.R. No. 317/2015) under Section 18 of the Land Acquisition Act 1894 only to the extent of 4/5th share of the total acquired land calculating it as 14 Hectares 20-Are.

(iv) The respondents submitted an application in the Reference (Exh. 6) seeking their impleadment, but the application was rejected. They also submitted an application with the Special Land Acquisition Officer under Section 30 of the Land Acquisition Act for apportionment seeking a

Reference to be made in that respect. But even that application was rejected. The respondents challenged the order passed by the Reference Court refusing them to implead by filing a Writ Petition in this Court. However, even before the Writ Petition could be decided, the Reference Court decided the Land Acquisition Reference on 30.11.2018. The petitioners were held entitled to receive an amount of Rs. 2,38,75,444/-. They have filed Special Darkhast No. 4/2019.

(v) Faced with the awkward situation, the respondents filed an application (Exh. 48) in the Regular Darkhast No. 8/2011 which is for execution of the partition decree, seeking a direction to call the amount of award from Special Darkhast No. 4/2019 in this execution of partition decree. The petitioners opposed that application on the ground that it was not competent for the Executing Court to go beyond the decree and issue any such direction.

(vi). After hearing the parties, by the order impugned in this Writ Petition the Executing Court directed the petitioners to deposit the amount of compensation received by them in the Reference in the Executing Court within 15 days of its receipt.

4. The whole emphasis of learned advocate Mr. Mahajan for the petitioners is on the fact that admittedly the petitioners have 4/5th share in the suit properties and even if those have not been divided by metes and bounds they have lodged Reference only to the extent of their share and are to receive the compensation only to that extent. It is not that the Reference in respect of all the lands that were acquired was filed. The Reference itself was limited to the extent of their share. Therefore, the respondents are not entitled to lay any claim to have a share in the fruits. He would then submit that even the respondents could have preferred a Reference to the extent of their collective 1/5th share which they failed to do. Though they made an attempt to intervene in the Reference filed by the petitioners, their

application was rightly rejected since the Reference Court could not have gone into this issue. He would, therefore, submit that the Executing Court has travelled beyond the decree in directing the petitioners to deposit the compensation.

5. By referring to the decisions in case of **Brakewel Automotive Components (India) Pvt. Ltd. Vs. P.R. Selvem Alagappan; 2017 (5) SCC 371**, and **State of Punjab Vs. Buta Singh; 1995 Supp(3) SCC 684** the learned advocate would submit that no sooner a decree for partition of land assessed to revenue is sent under Section 54 of the Code of Civil Procedure for effecting partition by metes and bounds. The Court passing the decree become *functus officio*. He would, therefore, submit that the impugned order travels beyond the jurisdiction of the Executing Court and is therefore illegal and void.

6. Per contra, the learned advocate Mr. More for the respondents submits that though the decree for partition of agricultural lands is to be executed by the Collector pursuant to the provision of Section 54 of the Code of Civil Procedure, the Court passing the decree still continues to have jurisdiction to supervise and see to it that the decree is executed correctly. He would place reliance on the decision in the case of **Annasaheb Rajaram Nagane Vs. Rajaram Maruti Nagane and others; 2001 (3) Mh.L.J. 53**. According to the learned advocate, since the suit properties were not actually partitioned by metes and bounds the petitioners could not have made a Reference only to the extent of their undivided share. So long as the suit properties continue to be joint, the petitioners are not entitled to carve out their undivided share. There is no error committed by the Executing Court in directing the money to be brought back.

7. I have considered the rival submissions and perused the papers. It is indeed a sorry state of affairs, which poses an intricate dispute for adjudication. One need not delve deep to observe that an Executing Court

cannot travel beyond the decree and one need not burden this judgment by citing catena of decisions.

8. However, simultaneously, it is equally trite that all disputes between the parties to a suit touching its execution, discharge or satisfaction have to be determined by the Executing Court as is contemplated under Section 47 of the Code of Civil Procedure and a separate suit is barred.

9. Again, it is equally trite that even if the decree is sent to the Collector under Section 54 of the Code of Civil Procedure for effecting partition of the lands assessed to revenue and in a sense the Court passing the decree become *functus officio* once it is so forwarded, still the questions to be determined by the Executing Court under Section 47 of the Code of Civil Procedure have to be determined by that Court. If, therefore, any dispute arises as to the correctness or otherwise of the decree executed by the Collector, the Executing Court would still have power to look into and decide these questions.

10. It is in view of such legal scenario that one will have to approach the matter in controversy. To repeat, even without there being any partition and separation of shares by metes and bounds, the petitioners chose to file the Reference to the extent of their 4/5th share in the five pieces of lands acquired out of seven suit properties. It is pertinent to note that till such separation the status of all the suit properties would continue to be joint. All the sharers would be joint owners as distinguished from owners in common. The very concept of joint ownership is that all the sharers to the extent of their share will have ownership over every portion of the joint property. Therefore, though the petitioners, apparently mischievously, preferred a Reference excluding the 1/5th collective share of the respondents, any thing that is earned by them in the form of enhanced compensation would enure to the benefit of all the sharers. It is indeed a mischief and I am consciously attributing this to the petitioners. Had there been some *bona fides* they

would have made a Reference in respect of all the lands under acquisition and it is thereafter that they could have claimed share in the compensation to the extent of their share under the decree. In stead they played a trick and apparently have not only deprived the respondents of getting the benefit of enhanced compensation but even have deprived themselves of getting some share in it.

11. True it is that though their application for intervention in the Land Acquisition Reference had failed and even the Land Acquisition Officer had refused to refer the dispute under Section 30 of the Land Acquisition Act to the Civil Court, the defendants also could have laid a claim under Section 28-A of the Land Acquisition Act which enables the owners of the lands which are acquired under the same project to get the benefit of the enhanced compensation awarded to the other land owners. The fact remains that the petitioners made the Reference excluding the 1/5th share of the respondents and as a result, unfortunately for both the sides, they are now deprived of getting a similar benefit of enhancement in the compensation to the extent of remaining 1/5th share out of the acquired suit properties.

12. In this respect it is also pertinent to note that there are seven pieces of suit properties which are agricultural lands of varied extent, which are to be separated by the Collector by metes and bounds. Though all these lands are from the same village, their fertility, convenience of cultivation and some such other factors are to be looked into by the Collector while demarketing the shares. It may not necessarily happen that each sharer would get his share in each of the lands. Depending upon all these factors it may so happen that the extent of land allotted to a sharer would be more if it is comparatively less fertile than a portion which is allotted to some other sharer which is fertile.

13 Out of seven agricultural lands in the suit properties only five lands

have been acquired. Pertinently, though out of five agricultural lands four have been acquired entirely (Gat Nos. 39/B, 42/2/C, 115/A, 129/A, land Gat No. 228 whose extent is 9-Hectares 28-Are is acquired only to the extent of 7-Hectares 60-Are.) Therefore, one cannot prejudge and indeed the petitioners could not have, as to if the Collector in executing the decree would allot the very portions in respect of which they are claiming compensation to their share while adjusting the equities. It is under such wrong assumption that they have chosen to prefer the Reference and claim the enhanced compensation. Now, even if they have done so, whatever benefit they have derived would collectively enure to the benefit of all the sharers.

14. Though the learned Judge of the Executing Court has not stated so in so many words, he has clearly borne in mind the crux of the controversy. It cannot be said that by directing the petitioners to bring money back he has exceeded the jurisdiction. His endeavour is clearly to set at naught injustice that is likely to be caused to the respondents and to restrain unjust enrichment by the petitioners. There is no dispute that the compensation which they have received or are to receive is in respect of portions of the suit properties which are still under execution and though the status of the properties in view of such acquisition has changed to the extent of the lands acquired, it has only changed the form. Therefore, I find no perversity, arbitrariness or illegality in the impugned order albeit, in stead of directing the petitioners to return the money, the learned Judge of the Executing Court could have directed them to furnish some security to its satisfaction and could have issued a direction to the Collector to take into account such amount of compensation received or to be received by the petitioners while adjusting the equities while effecting the partition by metes and bounds.

15. The decision cited on behalf of the petitioners (*supra*) are clearly distinguishable on facts. In the case of **Brakewel Automotive Components (India) Pvt. Ltd. (*supra*)**, the original defendants against whom an *ex parte*

decree was passed tried to raise an objection regarding maintainability of a suit in an execution of a money decree in a proceeding under Section 47 of the Code of Civil Procedure. Whereas, in the case of **Buta Sing (supra)**, in execution of a decree for a mere declaration the Executing Court had directed recovery of some money. It is in view of such fact scenario it was held that the Executing Court had exceeded the jurisdiction. Such is not the matter in hand and therefore, the petitioners are not entitled to derive any benefits from these decisions.

16. In the result, the Writ Petition, in substance is liable to be dismissed albeit the impugned order can be suitably modified in terms of the above observations.

17. The Writ Petition is partly allowed. The impugned order stands modified to the following effect :

(a) The Collector shall effect the partition by metes and bounds assuming as if the suit properties have not been acquired at all.

(b) He shall then take into account the shares of each of the sharers in the suit properties under acquisition and indicate it precisely and clearly which submitting the report regarding completion of execution.

(c) The petitioners would retain the amount of compensation subject to their furnishing a security before the Executing Court to its satisfaction and furnishing an undertaking that they would, in case, it is so directed in future bring back the money in terms of the report of the Collector.

18. The Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

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