

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9037 OF 2021

1. Jabbar Khan s/o Mehboob Khan,
Age : 68 years, Occu: Business,
R/o : Rehmanya Colony, Rahim Nagar,
Galli No.5, Aurangabad.
 2. Ghouse Khan s/o Mehboob Khan,
Age : 51 years, Occu : Agriculture & Business,
R/o: Galli No.5, Kiradpura,
Aurangabad.
 3. Yusuf Khan s/o Mehboob Khan,
Since Deceased through L.R's
 - 3(i) Shabana Begum Yusuf Khan
Age : 40 years, Occu: Household,
R/o: House No.4-11-84/P
Rehmaniya Colony, Kiradpura,
Aurangabad.
 - 3(ii) Umar Khan s/o Yusuf Khan
Age : 21 years, Occ: Nil,
R/o: House No.4-11-84/P
Rehmaniya Colony, Kiradpura,
Aurangabad.
 - 3(iii) Mariyam Bee D/o Yusuf Khan
Age : 17 years, Occ: Nil,
R/o: House No.4-11-84/P
Rehmaniya Colony, Kiradpura,
Aurangabad.
 - 3(iv) Saad Khan s/o Yusuf Khan
Age : 14 years, Occ: Nil,
R/o: House No.4-11-84/P
Rehmaniya Colony, Kiradpura,
Aurangabad.
 - 3(v) Osman Khan s/o Yusuf Khan
Age : 9 years, Occ: Nil,
R/o: House No.4-11-84/P
Rehmaniya Colony, Kiradpura,
Aurangabad.
- ... **PETITIONERS**
(Org. Plaintiffs)

(Petitioner No.3 (iii) to 3(v) are minor under the Guardianship of Mother
Petitioner No.3(i) Shabana Begum Yousuf Khan)

VERSUS

1. The District Collector,
Collector Office, Aurangabad.
2. Tehsildar,
Tehsil Office, Aurangabad
3. Mandal Adikhari / Talathi
Sajha, Palsi,
Taluka and District Aurangabad
4. Kasabai w/o Ajabdas Shinde
Age : 57 Occ: Household
R/o: Palshi, Tq & Dist: Aurangabad
through GPA
Vikas Kaduba Pakhare
Age : 51 years Occ: Agriculture
R/o Varud Kazi, Tq. & Dist. Aurangabad ... **RESPONDENTS**

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Advocate for Petitioners : Mr. Kasliwal Ajit D.

Advocate for Respondents : Ms. Sanghmitra B. Wadmare

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CORAM : MANGESH S. PATIL, J.

DATE : 20.08.2021

PER COURT :

Heard the learned advocate Mr. Kasliwal.

2. The only question that arises for determination in this Writ Petition is as to if the petitioners who are the defendants in the suit for partition, the decree in which has been put to execution and is sent to the Collector under Section 54 of the Code of Civil Procedure can file a separate suit for injunction against the Revenue Officials with a prayer that they shall execute the decree in letter and spirit.

3. The decree for partition has been passed at the instance of the wife and two daughters of the common ancestral against his son Sominath and the heirs of his deceased son Sandu. As can be seen the properties that were involved were Gat Nos.20, 23, 90 and 97. It was averred as to how Sominath and Sandu had sold several portions of these properties to the defendant No.6 to defendant No.10. It was further averred that the portion that was sold to defendant No.9 was further alienated by the latter to the husband of the defendant No.11. The present petitioner No.1 and his father were the defendant Nos. 12 and 13. The defendant No.11 had in turn sold that 1/3 share from Gat No.90 to these two persons by two separate sale deeds, a portion admeasuring 2 Acre 3 Guntha, and 2 Acre 4 Guntha respectively.

4. The petitioner No.1 who was the defendant No.12 with his brothers has now filed Regular Civil Suit No.627/2018 *inter alia averring* that the Collector and the other Revenue Officials have not been executing the decree passed in the earlier suit strictly in accordance with the terms and conditions. They claim mandatory injunction directing them to do so and further seek perpetual injunction restraining them from causing any obstruction to their possession pursuant to partition to be effected in accordance with the decree. Simultaneously they claimed temporary injunction in terms of the main relief but the two court below have dismissed the application and the Appeal. Hence this Writ Petition.

5. The learned advocate Mr. Kasliwal for the petitioners would

harp upon Clause 5 of the operative part of the judgment and decree passed in RCS No.610/1989 which reads thus:

“ORDER

1. *The suit is partly decreed with proportionate costs.*
2. *Plaintiff No.1 is entitled to get 3 acres of agricultural land out of total agricultural land, admeasuring about 26 A 14 G, as her share.*
3. *Plaintiff Nos. 2 and 3 are entitled to get only 1 acre of agricultural land each out of 26 A 14 G agricultural land, as per law.*
4. *Plaintiff No.1 is also entitled to get 1/4th plus 1/20th share of the house properties and plaintiff Nos. 2 and 3 each are entitled to get 1/20th share of the house properties concerned.*
5. *As the plaintiffs themselves compounded the matter in R.C.S. No.252/1994 and utilised the funds so received, i.e. Rs.60,000/-, fully for their purpose, which means that they got the benefit of total agricultural land, admeasuring about 15 A 18 G, which was one of the joint family property. So, in view of this state of affairs, they are not now entitled to get their shares again carved out from the other agricultural lands, which are already disposed off to other defendants concerned by executing the registered sale deeds.*
6. *The Court Commissioner be appointed for partitioning the house properties concerned, if the plaintiffs desire.*
7. *A preliminary decree be drawn up accordingly.”*

The learned advocate would emphasise on the last sentence which according to him clearly debars the decree holders from getting any share from the agricultural lands which have already been disposed of to other defendants by executing registered sale deeds. The learned advocate would submit that in spite of such specific direction, the Collector and the other Revenue Officials are bent upon to allot the decree holder even the shares from their land Gut No.90 which they have purchased.

6. The learned advocate would then submit that the bar contained

under Section 47 of the Civil Procedure Code is not applicable to the petitioners' case. Since the Collector and the other Revenue Officials are bent upon to execute the decree without understanding its effect, the only forum available for the petitioners is to file a separate suit. He would place reliance on the decision of this Court in the case of **Prakash Nathyaba Bhosale Vs. Laxman Ganaba Bhosale; AIR 2003 Bom 41** and **Mahadu @ Mahadeo Baji Bhosale Vs. Appaji Gunbarao @ Ganpatrao Bhosale (since deceased) & Ors.; 2003 (1) ALL MR 1158.**

7. The learned advocate Mr. Kasliwal would, lastly, point out that already the Appellate Court by the impugned order has directed expeditious disposal of the suit of the petitioners and the arrangement continues still date. The whole purpose of filing the suit would be lost if in the meanwhile the decree is executed.

8. I have carefully considered the submissions and the papers. One need not over emphasize the importance of the provision of Section 47 of the Civil Procedure Code. Any party to a suit who intends to dispute or raise any grievances touching execution, discharge or satisfaction of a decree, is not entitled to invoke a remedy of filing a separate suit but has to raise all these issues before the executing court. This is what is precisely happening in the matter in hand.

9. Admittedly, the petitioner No.1 and his father through whom the other petitioners can be said to be claiming a right in the property were the defendant Nos.12 and 13 in the original suit. If at all they have any

grievance touching execution, discharge or satisfaction of the decree passed therein, they are not entitled to put up any grievance by way of such separate suit. It is to be noted that they are not seeking to dispute validity of the decree on the ground that it be void under some law and cannot be executed at all.

10. This is what has been observed and concluded in the case of **Mahadu @ Mahadeo Baji Bhosale** (supra) wherein it has been specifically laid down that in case after a decree for effecting partition is sent to the Collector and he is effecting a partition contrary to the decreetal mandate, the Civil Court does not become *functus officio* and it has jurisdiction to see if the Collector has acted in accordance with the decreetal mandate. It was therefore appropriate for the petitioner to approach the executing Court in tune with these observations and not raise the issue by filing a separate suit calling upon the Civil Court to consider the matter all over again. It is in view of such state of affairs, there is a serious illegality in petitioners' suit.

11. There is one more aspect. Since the petitioners are now claiming specific reliefs in the nature of mandatory and perpetual injunction against the Revenue Officials restraining them from discharging their public function pursuant to the decree sent under Section 54 of the Code of Civil Procedure, there is a bar under Section 41 of the Specific Relief Act, 1963 in issuing any injunction in the form in which the petitioners are claiming.

12. Apart from the above state of affairs even if now the matter is to be considered on merits, touching the observations and conclusions in the

Clause No.5 of the operative part of the order (supra), one needs to read and understand these directions by reading the judgment as a whole. In paragraph No.22 it has been specifically observed that the plaintiffs therein were not bound by the alienation made by Sominath and Sandu. It is in the later part in paragraph No.26 there is a discussion as to how the Regular Civil Suit No.252/1994 was instituted in respect of a portion admeasuring 15 Acre 17 Guntha from the land Gat No.20 that was sold to the defendant No.10 by Sandu. It was further noticed that the dispute was compromised and it is pursuant to such compromise that the plaintiffs were not entitled to claim any share in the land Gat No.20.

13. Admittedly, the present petitioners were not the parties to that compromise. They are merely claiming their right pursuant to the sale deeds executed by Sandu in favour of defendant No.9 in respect of a portion of the land Gat No.90. Petitioners are claiming through the defendant No.9. There is no other observation or conclusion to be found in the body of the judgment and decree depriving the decree holders from claiming anything from the land Gat No.90. One need not delve further as that may have a bearing on decree being executed by the Revenue Officials. Suffice for the purpose to observe that *ex facie* the directions in paragraph No.5 of the operative part of the decree has the effect of refusing any share to the decree holders in land Gat No.20 in respect of which the compromise was arrived at and not to deprive them from receiving anything from land Gat No.90.

14. In view of such state of affairs, in my considered view there is

no merit in the Writ Petition. The two courts below, for the reasons mentioned in their respective orders have concurred in demonstrating as to how the petitioners are not entitled to claim the relief and consequently I find the observations and conclusions to be well reasoned and call for no interference in this petition.

15. The Writ Petition is dismissed *in limine*.

16. It is made clear that the observations made herein above are only for the purpose of deciding this Writ Petition and neither the Revenue Officials nor the courts below shall feel influenced by them.

17. At this juncture, the learned advocate Mr. Kasliwal requests that since 2018 there has been stay operating in favour of the petitioners and it may be extended by further two weeks to enable the petitioners to take a call pursuant to the observations made herein above.

18. When admittedly, a decree passed by the civil court which even otherwise takes years to execute has been stayed for some reason or the others since 2018, which has added to the delay, in my considered view, the facts and circumstances do not warrant any such request to be conceded. The request is rejected.

(MANGESH S. PATIL, J.)