

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

WRIT PETITION NO. 8794 OF 2012

Bapurao s/o Bajirao Rasal

Since deceased through L.Rs.

1. Dnyanoba s/o Bapurao Rasal and others ... Petitioners

Versus

Uttam s/o Sakharam Rasal and others ... Respondents

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Mr. S. S. Choudhary, Advocate for petitioners

Mr. P. S. Paranjape, Advocate for respondent No.1

Respondent Nos. 2, 3-A to 3-E - served.

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 21st JANUARY, 2021

PRONOUNCED ON : 28th JANUARY, 2021

PER COURT :-

. The challenge in this writ petition is to the order dated 03.09.2012 passed by the Joint Civil Judge, Senior Division, Parbhani below Exh.1 in execution proceedings being, Regular Darkhast No.178 of 1999. By the impugned order, the application moved by the petitioner for dismissal of the execution proceedings on the ground of having been barred by limitation, came to be dismissed. The petitioner (judgment debtor), is therefore, before this Court.

2. Shri S. S. Choudhari, learned Advocate for the petitioner would submit that the period of limitation for execution of a decree is 12 years. He brought to my notice Ground No.VIII of the present petition and ultimately submitted that the execution proceeding initiated by respondent No.1/deGREE holder was barred by limitation.

3. Shri P. S. Paranjape, learned Advocate for respondent No.1, would on the other hand, submit that just two days before, period of limitation of twelve years was to over, the proceedings for execution of the decree have been initiated. The learned Advocate took me through the reasons given by the executing Court to dismiss the application moved by the petitioners.

4. The petitioners are the legal representatives of Bapurao Bajirao Rasal. Respondent No.1 and his two brothers had instituted the suit (R.C.S. No.22/1959) against Bapurao. The challenge in the said suit was to the sale-deeds executed by their father in favour of late Bapurao. Since respondent No.1 and his both the brothers were minor, the suit was instituted by their mother on their behalf. The trial Court dismissed the suit (R.C.S. No.22/1959). Respondent Nos.1, 2 and deceased respondent No.3 preferred the appeal

thereagainst. It was Appeal No.46 of 1961. The learned Assistant Judge, Parbhani, allowed the said appeal on 16.12.1964 in terms of the following order:

“The result is that the appeal is partly allowed, the judgment and decree of the lower Court is modified and the suit of the plaintiffs is decreed as follows :

(1) It is declared that the first defendant has acquired the undivided interest of Sakharam in respect of survey No.40 under the sale-deed dated Khurdad 1358 fasli and that the sale-deed does not bind the interest of the plaintiffs provided the plaintiffs pay the defendant No.1 Rs.1200/- on account of the antecedent debt which have been proved. In case the amount of Rs.1200/- is not paid by 31.3.65, the claim of the plaintiffs in respect of this land shall stand dismissed.

(2) It is declared that the first defendant has acquired the undivided interest of Sakharam in respect of survey No.72/2 under the sale-deed dated 12.3.54 and the same does not bind the interest of the plaintiffs.

(3) The defendants should deliver possession thereof to the plaintiffs but the execution of the decree in respect of possession of survey No.40 and 72/2 shall be stayed in case the defendant 1 brings a suit for a general partition against the plaintiffs within 31.3.65 and the stay should continue until the disposal of such a suit but if no such suit is brought within that period, then the stay of execution will be cancelled.

(4) The defendants shall deliver possession of survey No.73 to the plaintiffs and in respect of this claim, there would be no stay and the plaintiffs can execute the decree for possession of this land forthwith.

(5) That the defendants shall pay the costs of the suit and this appeal and shall bear their own costs. A decree be drawn up accordingly.”

5. The second appeal i.e. Appeal No.2 of 1965 preferred by late Bapurao was partly allowed in following term:

“.....

.....

6. *In the result, the decree passed by the learned Assistant Judge, Parbhani, with regard to Survey Nos. 40 and 73 are fully confirmed. The declaration in respect of Survey No.72/2 under the sale-deed dated March 12, 1954 is also confirmed. The decree for possession of Survey No.72/2 is set aside. As the appellants had not raised the point of jurisdiction earlier, the appellants to pay the costs of the respondents in this Court.*

.....”

6. Late Bapurao filed R.C.S. No.164 of 1974 for general partition against the respondents herein, their mother and two others. The said suit was decreed on 30.10.1976 as under :

“The suit of the plaintiff is partly allowed.

The plaintiff shall get 1/3rd share in S.No.40 and 1/4th share in S.No.72/2. The defendant No.1 and 6 shall get 1/3rd share each in S.No.40 and 1/4th share in S.No.72/2.

In the remaining suit property, defendants No.1 to 3 and 6 each will get 7/30 share while the defendants No.4 and 5 each will get 1/30th share.

The partition and separation of the suit fields shall be made by the collector or any gazetted officer subordinate to him.

The portion wherein the well is situated in S.No.40 shall be included in the 1/3rd share of the plaintiff in S.No.40.

The commissioner will be appointed in execution of the decree for effecting the partition of the house property

and movable property according to the specification of the shares mentioned above.

A preliminary decree be drawn accordingly.

The plaintiff shall be allowed to retain his possession over the suit land S.No.72/2 to the extent of 3/4th share as the tenant. The defendants are at liberty to pursue any remedy for recovery of rent or for failure to pay the rent to them.

In the circumstances, all parties shall bear their own costs.”

7. Late Bapurao preferred appeal against the judgment and decree passed in R.C.S. No.164 of 1974. It was R.C.A. No.1 of 1977. Pending the said appeal, the suit was compromised on behalf of respondent Nos. 2 and 3 by their mother. Respondent No.1 contested the appeal, which was partly allowed in terms of the following order:

“The appeal is partly allowed.

The plaintiff/appellant is entitled to get 2/3rd (Two third) share in the land Sy.No.40 and 1/4th (one fourth) share in the land S.No.72/2 situated at village Nandapur, Taluka and district – Parbhani, by effecting the partition and separation of those lands.

The defendants no.1 to 3 and 6, who are respondents no.1 to 3 and 6 respectively in this appeal are entitled to her 7/30 (Seven-thirtieth) share each in the remaining lands Sy. No.73 and 42 and shows as well as movable property in dispute while defendants no.4 and 5 who no respondents No.4 and 5 in this appeal are entitled to get Rs.1/30th (one thirtieth) share each in those lands and house as well as movable property in dispute situated at village Nandapur, Taluka and district Parbhani.

The defendant no.5 respondent no.6 is entitled to get 2/3rd share in suit land Sy.No.40 referred to above.

The portion of the land herein old well is located in survey no.40 shall be included in 2/3rd share of the plaintiff/appellant out of sy.no.40 to which he is entitled.

The defendants no.1 to 3 Respondents no.1 to 3 have no right for further mesne profits in respect of suit lands against plaintiff-appellant Exhibit 45 shall be part and parcel of this decree. The defendants no.1 Respondent No.1, the defendant no.2 Respondent no.2 and defendant no.6/respondent no.6 are entitled to get 1/4th share each in suit land sy.no.72/2 referred to retain his possession over the suit land Sy.No.72/2 to the extent of 3/4th (Three fourth) area excluding the 6-Acres northern area out of that 3/4th share as at tenant.

Plaintiff-appellant and Defendant-Respondents be put in possession of their respective shares of the suit property as mentioned above.

Partition and separation of the suit lands assessed to the payment of revenue of the Government referred to above shall be made by the Collector, Parbhani deputed by him in that behalf in accordance with Law for the time being in force relating to the partition and separate possession of their shares.

Partition and separation of the house and movable property in dispute referred to above shall be made by a commissioner to be appointed as per the provisions Under Order XXVI Rule 13 of the Civil Procedure Code.

The appellant-plaintiff, Respondents No.1 to 3 Defendant no.1 to 3 shall bear their own respective costs as incurred by them in this appeal. The appellant plaintiff shall pay the cost of the respondent No.4 to 6 Defendants No. 4 to 6 of this appeal.

Judgment and decree under appeal stand modified accordingly.

Cross-Objection (Exh.14) stands dismissed. No order as to costs of that cross-objection. Decree be drawn accordingly.”

8. Second Appeal No.20 of 1983 preferred by late Bapurao, came to be dismissed on 06.10.1987.

9. By the decree passed in R.C.S. No.22 of 1959, respondent No.1 was held to have 1/3rd share in the suit lands. Late Bapurao was directed to deliver possession of the land Gat No.40 to the plaintiffs in the said suit. The decree passed in the said suit was stayed on the condition that late Bapurao to file suit for general partition. Accordingly, Bapurao filed suit (R.C.S. No.64 of 1974). The decree passed in the said suit attained finality in view of the decision dated 06.10.1987 given in Second Appeal No.20 of 1983.

10. By virtue of the decree in R.C.S. No.164 of 1974, respondent No.1 – Uttam (one of the plaintiffs in R.C.S. No.22 of 1959) became entitled to partition and separate possession as to share in the land S.No.40 (Gat No.117). He initiated the execution proceeding on 04.10.1999. The decree was directed to be executed by the Collector or any of his subordinates, since it was a decree for partition and separate possession of a land assessed to payment of land revenue.

11. Article 136 of the Limitation Act, 1963 reads thus:

136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court. Twelve Years. [When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

In the case of ***Bikoba Deora Gaikwad & Ors. vs. Hirabai Marutirao Ghorgare & Ors – 2008 (4) AIR Bom R 828***, it has been observed by the Apex Court that -

“Where decree was declaring shares of respective parties and parties were asked to get land partitioned through Collector and house property partitioned through commission, then decree passed is not final decree and application made under S.54 of C.P.C. to send decree to Collector is only step towards passing of final decree which is not execution application and hence no period of limitation would apply to such application.

.....

Section 54 of the Code in effect and substance confers a duty upon the Court. The said provision must be read in the context of the Order XXVI, Rule 13 of the Code and/or Section 51, Order XXI, Rule 11 thereof. It is not in dispute that in the State of Maharashtra the practice to get the properties partitioned by a District Collector still continues.

10. Section 54 only provides for a ministerial functions of a court. It cannot be termed to be an execution proceeding.

11. It is now well settled that for the purposes of construing the nature of the decree one has to look to the terms thereof rather than speculate upon the Court's intentions.

12. A bare perusal of Section 54 read with Order XX, Rule 18 of the Code leaves no manner of doubt that the application filed before the Court to send decree and papers to Collector to carry out partition was not and could not have been an application in execution.

*If it was not an application for execution, the question of the application of the provisions of the Limitation Act would not apply.
.....”*

12. Since, respondent No.1 – Uttam's undivided share in the suit lands was finally directed to be put in possession by effecting partition through the Collector, then there is no question of period of limitation being there for institution of proceedings for execution of decree.

13. The executing Court has rightly negated the contention of the petitioners, may be for different reason. No interference is called for with the impugned order. The writ petition fails. The same is therefore, dismissed.

[R. G. AVACHAT, J.]