

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2874 OF 2019

1. Kusum w/o Arvind Dhole,
Age-65 years, Occu-Household,
R/o. Rangar Galli, Tq.Sangamner,
Dist.Ahmednagar

2. Dhananjay s/o Arvind Dhole,
Age-42 years, Occu-Service,
R/o.Rangar Galli, Tq.Sangamner,
Dist.Ahmednagar

-- PETITIONERS

VERSUS

1. Malti w/o Suresh Dhole,
Age-51 years, Occu-Household,
R/o. Rangar Galli, Tq.Sangamner,
Dist.Ahmednagar,

2. Nilesh s/o Suresh Dhole,
Age-27 years, Occu-Agriculturist,
R/o. Rangar Galli, Tq.Sangamner,
Dist.Ahmednagar

3. Nilima d/o Suresh Dhole,
Age-26 years, Occu-Nil,
R/o. Rangar Galli, Tq.Sangamner,
Dist.Ahmednagar

4. Ashlesha w/o Manoj Dhole,
Age-37 years, Occu-Household,
R/o Matade Mala, Sukewadi Road,
Sangamner, Tal.Sangamner,
Dist. Ahmednagar

5. Aman s/o Suresh Dhole,
Age-15 years, Occu-Education,

Through his Natural Guardian,
Ashlesha w/o Manoj Dhole,
R/o Matade Mala, Sukewadi Road,
Sangamner, Tal.Sangamner,
Dist. Ahmednagar

6. Sneha d/o Manoj Dhole,
Age-11 years, Occu-Education,
Through her Natural Guardian,
Ashlesha w/o Manoj Dhole,
R/o Matade Mala, Sukewadi Road,
Sangamner, Tal.Sangamner,
Dist. Ahmednagar

7. Kirti w/o Sachin Mule,
@ Kirti d/o Arvind Dhole,
Age-38 years, Occu-Service,
R/o Sachin Gadi Karkhana,
Khandoba Galli, Sangamner,
Tq. Sangamner
Dist.Ahmednagar

8. Kedarnath s/o Lalchand Tapde,
Age-60 years, Occu-Business,
R/o Malawad,
Sangamner, Tq. Sangamner,
Dist.Ahmednagar

9. B.J.Khatal Janata Sahakari Bank Ltd.,
Through its Manager,
R/o. Sangamner, Tq. Sangamner,
Dist. Ahmednagar

-- RESPONDENTS

Mr.S.S.Dixit, Advocate for the petitioners.
Mr.K.N.Shermale, Advocate for respondent Nos. 1 to 3.

(CORAM : BHARATI H. DANGRE, J.)

RESERVED ON : 11/01/2022
PRONOUNCED ON : 25/01/2022

JUDGMENT :

1. The present petition is filed by the petitioners, being aggrieved by orders passed by the Jt.Civil Judge, Sr.Division Sangamner below Exhs.23 and 28 in the execution proceedings and it is prayed that the order is (Darkhast No.64/2015) is *nonest*, since what is executable is a final decree and not a preliminary decree. This is the precise ground on which the writ petition is filed.

2. Heard the learned counsel Shri.S.S.Dixit for the petitioners and learned counsel Shri.K.N.Shermale for the respondents.

In order to appreciate the bone of contention between the parties, brief facts involved chronologically need a mention.

Respondent Nos. 1 to 3 filed Regular Civil Suit No.212/2012 against the petitioners and respondent Nos. 4 to 9 for partition and injunction. The suit came to be decreed on 16/02/2015, declaring that plaintiffs and respondent Nos. 1 to 6 have 1/2 share in the suit property. It was further directed that since the suit property was a house property, after appointing a commissioner, the partition shall be effected as per the share determined in the judgment. As far as mesne profit is concerned, an enquiry was directed to be initiated. The

judgment dated 16/02/2015 directed a preliminary decree to be drawn.

3. Being aggrieved and dissatisfied by the judgment passed in RCS No.212/2012, the petitioners/the judgment debtors filed Regular Civil Appeal No.47/2015 before the District Judge, Sangamner, which is pending for adjudication without any orders being passed, granting stay to the effect and operation of the judgment impugned.

4. On 06/04/2015, the respondents to the suit i.e. 1 to 3 filed execution proceeding, seeking execution of the preliminary decree drawn in RCS No.212/2012. On 23/03/2017, an application was moved by the decree holder vide Exh.16 for appointment of Court Commissioner for effecting partition and the learned Executing Court by its order dated 23/03/2017 appointed Court Commissioner and issued directions of partitioning the suit house and submit its report. In furtherance of the said order, the Court Commissioner carried out the commission on 15/07/2017 and filed his report alongwith a map (Exh.22) on 21/07/2017. Upon the report being filed, the decree holder moved an application at Exh.23 for effecting partition of the suit property in terms of the aforesaid report of the Court Commissioner.

This was vehemently objected to by the petitioners/judgment debtors by filing their say and the thrust of the submission is that the final decree is yet to be passed and therefore the partition cannot be effected based on Exh.22.

5. On 27/06/2018, the Executing Court allowed the said application and directed the Court Commissioner to effect the partition in terms of the report at Exh.22. This constrained the petitioners to approach this Court by filing a writ petition, vide WP No.184/2018 and this Court, on consideration of the rival pleadings and by making a reference to the provisions of Order XX Rule 18 and the decision of the Apex Court in case of **Renu Devi Versus Mahendra Singh and others [(2003) 10 SCC 200]**, which carved out an exception to the said provision, when a preliminary decree for all practical purposes is a final decree, noted that while passing the impugned order, the learned Judge did not advert to the various circumstances, which may lead to the conclusion that for all practical purposes, a preliminary decree in a given case can be treated as a final decree and by recording that the impugned order do not reflect any such inquiry being made to pose an exception to the provision of Order XX Rule 18, disposed off the writ petition with the

following directions :-

"7. Accordingly, writ petition is disposed of setting aside order dated 27 June 2018. The learned Civil Judge will decide the application below Exh.23 afresh in the light of above observations. Considering the fact that the proceedings are is pending since long, the learned Civil Judge will expedite disposal of the proceeding and dispose of the application Exhibit 23 within a period of four weeks from today. The parties shall appear before the learned Civil Judge on 5 December 2018 at 10.30 a.m. The learned Civil Judge will fix further time table of disposal of this application."

6. On the matter being remanded to the Executing Court, the application vide Exh.23 and 28 in the Regular Darkhast was considered afresh by the learned Civil Judge, S.D. Sangamner and on perusal of the authoritative pronouncement holding the field, revolving around Order XX Rule 18, the learned Judge arrived at a conclusion that on the Court Commissioner being appointed and the shares being determined, for all practical purposes, the execution of decree is final and at this stage it is to be said that a preliminary decree has to be converted into a final decree, it would mean that going back and repeating the same exercise, which is already undertaken by the decree holder in the execution proceedings. In the wake of the aforesaid finding being recorded, the

application of the decree holder was once again allowed, by an order dated 09/01/2019 and the Court Commissioner was directed to effect partition of the suit property as per report at Exh.22. It is this order which is subject matter of the present writ petition.

7. The learned counsel Mr.Dixit for the petitioners placed reliance upon the decision of the Apex Court in case of **Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others [(2007) 2 SCC 355]** in support of his submission that what can be executed is a final decree and not a preliminary decree, unless and until final decree is a part of a preliminary decree. By relying upon the aforesaid authoritative pronouncement, the learned counsel would submit that the preliminary decree merely declare the rights and liabilities of the parties, However, in a given case, a decree may be both preliminary and final, but what is executable is a final decree and only after final allotments are made, or a determination is made upon passing of a final decree, it can be executed, is the submission. He has also placed reliance on the decision of the Apex Court in case of **Shankar Balwant Lokhande (Dead) by LRS Versus Chandrakant Shankar Lokhande and another [(1995) 3 SCC 413]**, which has succinctly drawn a distinction between a preliminary

decree and final decree qua its nature and by relying upon paragraph no.12 of the said Law Report, he submit that the Executing Court can not receive a preliminary decree unless the final decree is passed as envisaged under Order XX Rule 18(2) of the CPC, since it is argued that as, after a final decree is passed and a direction is issued to pay stamp papers for engrossing the final decree drawn and upon the same being duly engrossed on stamp paper, it becomes executable and therefore the condition precedent is to draw up a final decree and then to engross it and it is only when these two acts are performed, it constitutes a final decree, crystallizing the rights of parties in terms of preliminary decree. Mr.Dixit would thus submit that the decree holder has adopted a wrong approach when he approached the Executing Court for executing a preliminary decree, when till date no final decree has been passed.

The learned counsel would also submit that the distinction between the preliminary decree and the final decree was noted by this Court in the earlier round of litigation when the petitioners have approached this Court and the matter came to be remanded back to the Civil Court for determining, the special circumstances which would justify an exception to Order XX Rule 18 of the CPC, as ordinarily a preliminary decree merely creates right, an exception being, whether

preliminary decree for all practical purposes is a final decree, but the learned Judge, despite specific directions from the High Court, has failed to adhere to the guidance and once again fallen into the same error by putting the preliminary decree to execution.

Per contra, the learned counsel for the respondents would place reliance upon the decision of the Apex Court in case of **Renu Devi Versus Mahendra Singh and others [(2003) 10 SCC 200]**, which highlights the position revolving around Order XX Rule 18 of CPC in a suit for partition and he would also place reliance on the decision of the Apex Court in **Shub Karan Bubna alias Shub Karan Prasad Bubna Versus Sita Saran Bubna and others [(2009) 9 SCC 689]**. The submission of the learned counsel in support of the impugned order is to the effect that the Executing Court has followed the right track of appointment of Commissioner and by invoking Order XXVI Rule 13, Commissioner has been appointed. The Commissioner has submitted his report and he has chalked out the manner in which the property is to be partitioned in between the plaintiffs and the defendants and the learned counsel would submit that no serious objection is raised by the judgment debtor to oppose the report of the Court Commissioner except by a vague gesture, to state that the report is not acceptable to

them, without any justifiable or objectionable points being put forth before the Executing Court. The learned Counsel would submit that in a suit for partition, particularly when it is a house property, the procedure prescribed being, appointment of a Court Commissioner and partitioning the property as per his report who has to be technically partition the property and effect the partition and once the report has been accepted and no objection has been raised to it by the judgment debtor, at the time when the Commissioner was appointed, at the fag end, merely to keep away the decree holder away from the fruits of decree, the objection is raised for the first time that preliminary decree cannot be executed. In any case, the learned counsel would submit that the decision relied upon by the learned counsel for the petitioners are clearly distinguishable on facts and the decision in Renu Devi (supra) has been clearly applied to the facts in hand by the Executing Court and the factors being driven to demonstrate that the preliminary decree would itself amount to a final decree, since nothing more is required to be done. He, therefore, submit that the impugned order should be upheld and the writ petition be dismissed.

8. Order XX Rule 18 of the Code set out a provision in respect of a

decree in suit for partition of property or separate possession of a share therein. The said provision read as under :-

"Order XX Rule 18 : Decree in suit for partition of property or separate possession of a share therein : Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then -

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

9. As far as the decree which relates to an immovable property,

which is under subject to any assessment of revenue, by virtue of Sub Rule (2) of Rule 18, the Court may, in case the partition and separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of several parties interested in the property and give such further directions as may be required. Order XXVI relate to 'Commissions' to make partition and the relevant rule, Rule 13 prescribe the procedure to be followed during the course of an inquiry by the Commissioner. The said provision is to the following effect :-

"13. Commission to make partition of immovable property :- Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner :- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied ; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

10. The reading of the aforesaid provision, would reveal that where a preliminary decree has been passed, the Court may in a case not covered by Section 54, i.e. where the estate to be partitioned is not assessed to the payment of revenue to the Government, appoint the Commissioner to effect the partition or separation according to the

rights as declared in the preliminary decree.

Rule 14 contemplate the procedure, which include division of the property into as many shares as directed by the order under which the Commission was issued, after undertaking such enquiry as may be necessary and the Commissioner shall allot such share to the parties and if authorized under the order, award sums to be paid for the purpose of equalizing the value of the shares. The report so prepared under the signature of the Commissioner, distinguishing and marking each share by metes and bounds shall be transmitted to the Court and the Court, on hearing the objection, shall confirm, vary or set aside the said report. The Rule further contemplates that when the Court confirms or varies the report, it shall pass a decree in accordance with the same as confirmed or varied, but when it set aside the report, received a new Commission can be appointed or an appropriate order be passed.

11. The provision referred to above will have to be read in the light of the definition of the term "decree" as contained in Section 2(2) of the Code, which reads as under :-

"Decree" means the formal expression of an adjudication which,

so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include -

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

12. Perusal of the above definition, would clearly reveal that the decree may be either preliminary or final. The explanation appended makes the position further clear to the effect that a decree is preliminary when further proceedings are required to be taken before the suit can be completely disposed off; it is final when such adjudication completely dispossess of the suit. A decree may be partly preliminary and partly final is also what the explanation provide for.

Perusal of Part II of the Code, which govern the execution, provides that decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The said part do not make a distinction between preliminary decree and the final decree and

rightly so since the definition of "decree" under the Code include even a preliminary decree. The application to be preferred for execution of a decree as contemplated under Order XXI Rule 10 permit a holder of a decree, who desires to execute it, to make an application to the Court, which passed the decree or to the Officer (if any) appointed in this behalf or if the decree has been sent to any Court, then to such Court or to the proper Officer thereof.

13. In the background of the said scheme contained in the Code of Civil Procedure, revolving around the decree and its execution, the judgment in question passed by the learned Civil Judge, Sr.Division, Sangamner in RCS No.212/2012 is perused, it declares the share of the plaintiffs and defendant Nos. 1 to 6 in the suit property and by invoking order under Order 26 Rule 13 of the CPC, the Commissioner is appointed to divide the property in terms of the judgment, since the suit property is a house property. The judgment directs that the preliminary decree be drawn accordingly. Notice came to be issued to the judgment debtor on 17/07/2015 under Order XXI Rule 22 to show cause as to why the decree should not be executed against them. On the notice being served, since the judgment debtors failed to mark their

presence, the Court proceeded *exparte* against them. By an order dated 15/02/2016, the application for execution was kept pending when on 19/09/2016, the Executing Court recorded as under :-

"D.H. is present alongwith his counsel. Advocate of J.D. is also present. There are chances of settlement. Hence, matter is referred to Mediation Center, District Court, Sangamner. Parties are directed to remain present on 20/10/2016 before the Mediator."

14. On 21/04/2016, the decree holder moved an application for appointment of a Commissioner for effecting partition in terms of the judgment and this application came to be granted on 23/03/2017 after hearing the judgment debtors, who argued that they had challenged the judgment in an appeal, but since there was no stay to the execution of the judgment, the Court deemed it expedient to appoint the Commissioner, whose expenses were directed to be borne by the Decree holder. Direction was issued to the Court Commissioner to submit his report to the Court forthwith.

In pursuance of the said direction, learned Advocate Mr.K.D.Shaikh, the Commissioner appointed by the Court submitted his detailed report vide Exh.22 and in paragraph No.4 of the said report, he

proposed the division of the suit property into 2 halves as directed by the judgment. The report was accompanied with a sketch map reflecting the manner in which the partition is to be effected as per the judgment. The judgment debtor submitted his say to the said report on 31/11/2017 by stating that the report is not acceptable to them. It is pertinent to note that no reason is given as to why the report is not accepted and even no objection to the said report is raised in specific terms.

In the wake of the aforesaid decree holder moved an application vide Exh.23 requesting the Court to effect the partition/division of the property in terms of the said report, which is again opposed by the judgment debtor and for the first time, by raising a ground that the decree passed in RCS No.212/2012 is a preliminary decree and it is not yet converted into a final decree, hence the application should be rejected.

15. The learned Civil Judge considered the said application and by relying upon the decision of the Apex Court in case of Renu Devi (supra) by recording that the preliminary decree posed in this case is for all practical purposes culminated the proceedings in the suit and

since the judgment declared two shares of the suit property one to each, i.e. plaintiffs and the defendants, it was recorded that for practical purposes, the darkhast is final and therefore the Court Commissioner was directed to effect partition of the suit property as per the report at Exh.22.

16. The provision contained in Order XX Rule 18 contemplate passing of a preliminary decree which merely declares rights, but an exception being made when a preliminary decree for all practical purposes is a final decree. The decision of the Apex Court in case of Renu Devi (supra) emphatically focused upon Order XX Rule 18 and in the wake of the facts involved and, the following observation of their Lordships is relevant :-

"8. A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be

worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. (See CPC by Mulla, Vol.1, 1995 Edn.p.21.) The distinction between preliminary and final decree is this : a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree."

True it is that in the said case, the decree was based on compromise and the shares of each of the 3 groups were actually trifurcated and given to the parties entitled thereto. The decree demarcated the properties forming the subject matter by metes and bounds and in paragraph No.9, the Apex Court noted that for all practical purposes, the decree dated 13/02/1978 was a final decree. The following observations of their Lordships revolving around Order XX Rule 18 are relevant for reaching me to a definite conclusion.

"Under Order 20 Rule 18 CPC it is not necessary to pass a preliminary

decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Often such are the cases which are based on compromise. The present one is such a case. However, still one of the parties sought for a final decree being drawn up. The Court and the parties acted under the misapprehension that the decree dated 13.02.1978 was a preliminary decree and therefore a final decree was needed to be drawn up. As we have already stated, the final decree dated 24.05.1979 is nothing but a reproduction of the schedules contained in the preliminary decree dated 13/02/1978. The only difference is that the decree dated 24.05.1979 is engrossed on stamp papers while the decree dated 13.02.1978 was not."

17. The ratio flowing from the aforesaid decision can be discerned to the effect, that if the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition, then the Court may as well pass a final decree at the very first instance instead of a preliminary decree, unless some

more inquiry is required to be conducted and the rights of the parties to be finally determined, subsequent to the passing of a preliminary decree and it is only upon undertaking the said exercise, the final decree can be passed.

True it is, that in the present case the decree holder ought to have moved the Court for appointment of Commissioner in terms of the judgment and requested the Court to pass a final decree instead of putting the preliminary decree for execution. In any case, the same Court which had passed the decree appointing the Commissioner in terms of its judgment and the Commissioner submitted a report to the Court indicating feasibility of the partition in the manner set out in the report. The judgment debtors never raised the objection to the appointment of Court Commissioner at that stage by projecting that the preliminary decree cannot be executed instead as an empty formality opposed the report of the Commissioner. The Court proceeded to accept the report since there was no justiciable opposition to the same and on application by the decree holder, directed the Commissioner to effect the partition in terms of the report and the next stage being issuance of a final decree demarketing the shares by metes and bounds.

18. The approach adopted by the Trial Court cannot be said to be *dehors* the procedure prescribed under the Code of Civil Procedure except that the entire process continued by the Court is under the Darkhast i.e. the execution stage. However, the Court was conscious of the fact that the darkhast is final, since the report of the Commissioner is on record and the partition is to be effected in the wake of the shares determined by the judgment.

19. The case in hand before me, is a case where a preliminary decree, on obtaining the report of the Commissioner deserves to be finalized, since the house property is capable of partition in terms of the judgment, dividing it into 2 halves, as per the report of the Commissioner. The principle upon which much emphasize is laid by the learned counsel for the petitioners, to argue that only a final decree can be executed and not a preliminary decree, based on the decision of the Apex Court in case of Hasham Abbas (*supra*) revealed distinct facts. In the case, before the Apex Court, the appellants / respondent Nos. 1 and 2 were brothers and a suit for partition was filed by respondent No.1 where preliminary decree was passed. An application purported to be a special darkhast was filed by respondent No.1 and a

commissioner was appointed, who opined that the property was impartial and therefore a proposal was moved that the property be put on sale in between the co-sharers. The appellant accepted the Commissioner's report but he filed an application for putting the said property on auction sale and for equal distribution of proceeds thereof amongst the co-sharers. A sale proclamation was issued and the appellant expressed his intention to buy the property on a valuation made by the Government valuer. A valuation report came to be filed by the appellants, which was objected to by respondent No.1 and the appellants were called to deposit 2/3rd of the amount of valuation, which they failed to comply. When he offered the highest amount, the Trial Court held that the property was put on auction sale and the best price would be the highest bid, which is received. The appellant raised an objection to the effect that he should be allowed to buy the shares of other co-sharers which came to be rejected by the Trial Court Judge by holding that it would not be necessary to initiate final decree proceedings and the said purported special darkhast filed by the appellant would be treated as an application therefor. The writ petition filed against that order by the appellant was dismissed by the High Court and before the Apex Court, the short question which arose for

consideration was, "Whether the property in suit could be put in auction sale without initiating a final decree proceedings." All the observations made in paragraph Nos. 18 to 20 of the said Law report are based on the peculiar facts.

This is not a situation here since in the darkhast application, the decree holder is seeking report of the Commissioner, who was already appointed under the judgment by the concerned Court and when a preliminary decree was directed to be drawn.

Similarly, the decision in case of Shankar Balwant (supra) is also set in backdrop of peculiar facts involved whether a preliminary decree for partition was passed on 02/08/2015 declaring that the respondent was entitled to 1/6th share and the appellants were entitled to 5/6th share. A Commissioner was directed to be appointed to partition the properties, but the decree declared certain charges in respect of the properties. On 19/12/1960, respondent No.1 supplied non judicial stamps to engross and sign the final decree to the extent of his share and therefore the Trial Court engrossed a decree in his favour and since the appellants have not supplied any judicial stamps, no final decree was passed qua them. The Darkhast filed by them in the year 1965 was dismissed being barred by limitation and the first appeal was dismissed

by the High Court by taking a view that no final decree having been passed on non judicial stamps, there was no decree in existence for its execution and in the wake of the facts involved, the Hon'ble Apex Court in *Shankar Balwant (supra)* rendered a finding to the following effect in paragraph No.7 and 8 :-

"..... Therefore, as envisaged in sub-rule (2) of Rule 18 of Order 20, it was only a preliminary decree declaring the rights of the parties with power to the Court to give further directions in that behalf. It is settled law that more than one final decree can be passed. With the passing of the final decree in respect of the share of the first respondent, the rights of the parties in respect of other properties have not been crystallized and no final decree dividing the properties by metes and bounds was passed nor any application was made to divide the properties in terms of the shares of the parties declared in the preliminary decree.

8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no

formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree."

20. The observations made about are to be read in background of the facts involved and therefore the aforesaid two decisions are not succor to the judgment debtor /petitioner, as a decision is only on authority for what it actually decides.

It is settled position of law, that the preliminary decree which declare the rights and liabilities of the parties between the parties, in a given case, may finally determine their rights and liabilities and a decree may be both preliminary and final and even a decree may be partly preliminary and partly final. The final decree would come into effect when a suit is completely disposed off and looking to the terms of the judgment resulting into preliminary decree, since the learned Judge has carried out the further process of appointing the Commissioner to effect partition in terms of his judgment, upon the report being accepted, the partition is directed to be effected in terms of the report

of the Commissioner. Upon execution of the said report, the decree will attain finality and a ministerial act of drawing the final decree remained to be performed by dividing the property by metes and bounds. In any case, there is no objection raised by the judgment debtor to the manner in which the property is proposed to be partitioned except that it is not accepted to them.

In the wake of the aforesaid circumstances, the preliminary decree will take shape of the final decree on the report of the Commissioner being executing by effecting partition in terms of his report. Merely because the proceedings are carried out in another caption of execution proceedings, do not make it fallible and the procedural formality of going through the process as directed in the judgment, need not be gone through in the peculiar facts of this case.

Necessarily by upholding the impugned order, passed below Exh.Nos.23 and 28 in Regular Darkhast No.64/2015, directing the Court Commissioner to partition the suit property as per Exh.22, the writ petition is dismissed.

21. At this stage, the learned counsel Shri Dixit for the petitioners make a request to continue the interim relief, which prayer is strongly

opposed by learned counsel Shri Shermale. In view of the long pendency of the proceedings and since now the matter has been determined on merits, the request of Shri Dixit is declined. Interim relief in favour of the petitioners shall cease to operate, on dismissal of this writ petition.

(BHARATI H. DANGRE, J.)