

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

WRIT PETITION NO. 4676 OF 2019

Shaikh Abdul Kadar Muneer,
Deceased, through LR's
Shaikh Mahetabbee Abdul Kadar & Ors. ...Petitioners

Versus

Shaikh Papa @ Ayyaj Sadroddin
Deceased, through LR's
Shaikh Salimabi Papa @ Ayyaj & Ors. ...Respondents

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Ms. Anjali Dube (Bajpai), Advocate for the petitioners
Shri. Amol S. Sawant, Advocate for respondent nos. 9A to 9G

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**CORAM : BHARATI H. DANGRE, J.
DATE : FEBRUARY 17TH, 2022**

PER COURT : -

1. Heard the learned Counsel Ms. Anjali Dube (Bajpai) for the petitioner and Shri. Amol S. Sawant, learned Counsel for the respondent.

2. In the backdrop of the two intertwining decrees, one obtained by the petitioner and another obtained by respondent nos. 9A to 9G, the issue is, which decree would govern the partition between the parties, since both the suits sought partition of the ancestral property.

3. The petitioner had instituted Special Civil Suit No.283/1994, for partition and separate possession of the properties described in paragraph no. 1 of the plaint. The pleading reveal that one Bibabi, who died on 03.01.1931, left behind her heirs and according to the plaint, all the heirs are parties to the suit. It is not in dispute that the respondent no. 9 was not a party to the suit and the specific submission is that since she is a granddaughter-in-law of the pre-deceased son – Mohd. Daud, and since the parties are Sunni Mohammedan, the contention is the legal heirs of the pre-deceased son are not entitled for a share in the property.

. As it may be, this suit came to be decreed on 17.08.1996, and the plaintiffs were held eligible for 7/15th share in respect of one property and 1/3rd share in respect of the other property. A final decree application came to be preferred and in this proceeding Smt.Banabee Mohammad Daud Shaikh i.e. respondent no. 9 filed obstruction seeking impleadment of herself as well as her legal heirs. This application came to be rejected in the year 2010 on the ground that she had filed another Special Civil Suit No. 97/2010.

4. The sequence of events reveal that Smt. Banobi instituted Reg. Civil Suit No. 496/2012, in which she impleaded all the plaintiffs in Special Civil Suit No.283/1994, as defendants and she

sought a declaration to the effect that the decree passed in Special Civil Suit No.283/1994, without impleading her branch as a party-defendant amount to playing fraud on the Court and is not binding on the plaintiffs. She also sought partition and separate possession of the suit properties set out in paragraph no. 2 of the plaint, which cover properties, which were earlier directed to be partitioned by the decree dated 17.08.1996 passed in Spl. Civil Suit No. 283/1994. Pertinent to note that this included the properties in form of CTS No.6431, 6432, 6433 and 7265, which were directed to be partitioned by allotting respective share by the decree dated 17.08.1996.

5. Smt. Banobi succeeded in her attempt when her suit came to be decreed on 21.10.2016, and a specific declaration is given in her favour to the effect that the decree passed in Spl. Civil Suit No. 283/1994 (suit filed by the plaintiff) has been obtained by playing a fraud on the Court and it is not binding on the plaintiffs. As far as the prayer for partition and separate possession is concerned, it came to be granted by declaring that the plaintiffs have 2/7th undivided share jointly in the property which they are entitled to get partitioned and allotted separate possession of their share. The Judgment dated 21.10.2016, also determined the shares of the defendants in the suit

properties and they were held entitled for 2/7th undivided share jointly and were also held entitled for getting their share partitioned and obtained separate possession of their share. The Court Commissioner was also appointed for partition of the suit.

6. This decree dated 21.10.2016, is not challenged by the present petitioners in an appeal though it is stated that it is assailed in the appeal by some other defendants, i.e. defendant nos. 10-A to 10-K, the appeal being registered as Reg. Civil Appeal No. 16/2017. There is no dispute that the present petitioners are not party to the said appeal.

7. The petitioners filed Special Darkhast for execution of the decree in their favour and in this proceedings, Banobi sought an intervention, which came to be rejected on the ground that a separate suit is filed by her. However, after the suit filed by Banobi came to be decreed in the year 2016, her daughter-in-law and other heirs sought impleadment in the said suit by filing an application vide Exh.24 in the Special Darkhast No. 22/2018. The intervention was obviously sought on the ground of a decree in their favour in Reg. Civil Suit No. 496/2012 and it was necessary to bring this to the notice of the Court and since the execution was sought *qua* the same properties

which were involved in the suit filed by the intervenors.

. Another application vide Exh. 25 was filed praying for stay to the execution of the possession warrant in the execution proceedings filed by the petitioner and these two orders are granted by the learned Court on 31.01.2019, which is the subject matter of the present writ petition.

8. In the gamut of the facts involved, the intervention of the respondent no.9 and her heirs, is perfectly justified since the decree obtained by the petitioner in their suit is declared to have been obtained by fraud and not binding on the plaintiffs and this declaration is accorded in a suit filed by Banobee and her legal heirs. They claim the interest in the outcome of the earlier Spl. Civil Suit No.283/1994, since the partition has been effected by a decree passed on 21.10.2016 in respect of the very same properties, there cannot be any ground or justification to deny their impleadment in the Darkhast proceedings filed for execution of the decree dated 17.08.1996.

. As far as the stay is granted to the possession warrant, the learned Judge has rightly construed the events involved and particularly a subsequent event in the form of a decree in favour of Smt. Banobee and her heirs, by which a declaration is given that the

decree passed in Spl. Civil Suit No. 283/1994 has been obtained by playing fraud on the Court and not binding on the plaintiffs. Smt. Banobee and her heirs, who were not a party to the Spl. Civil Suit filed by the petitioners are now held eligible for 2/7th undivided share jointly in the suit property. In the wake of the entitlement being created in their favour, which, as on date, govern the parties since there is no stay to the implementation and execution of the Judgment and Order dated 21.10.2016 in Reg. Civil Suit No. 496/2012, and particularly, when the petitioners have not even taken pains to challenge the same, the possession warrant in terms of the decree passed in Spl. Civil Suit No. 283/1994, cannot be executed. It is open for the learned Court to wait for the outcome of the appeal filed by some of the parties assailing the Judgment and Decree dated 21.10.2016 or if at all the parties come before the Court, depending upon what shares they are entitled to take in terms of the decree, he shall either permit or restrain the further execution of the decree in favour of the petitioners.

9. Finding no legal infirmity in both the orders, the writ petition is dismissed.

[BHARATI H. DANGRE]
JUDGE