

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9721 OF 2019

Madhukar S/o Satva Waghmare & Anr.	...Petitioners
Versus	
Nilabai Rangnath Waghmare & Others.	...Respondents

ALONG WITH
WRIT PETITION NO.9697 OF 2019

Godawari Wd/o Narhari Shinde & Others	...Petitioners
Versus	
Nilabai Rangnath Waghmare & Others.	...Respondents

...

Mr. Sanjay Wakure, Advocate for the petitioners in Writ Petition No. 9697/2019.

Mr. S.W. Munde, AGP for Respondent/State.

Mr. S.G. Chapalgaonkar, Advocate for respondents No. 1 to 5.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 11th AUGUST, 2022

ORDER :

1. Since both these petitions raise similar question of law and fact, they were heard together and are being decided by this common order.

2. The petitioners are aggrieved by the order passed by the learned Civil Judge, Junior Division, Osmanabad, dated 23.07.2018, thereby sending decree to the Collector, Osmanabad.

3. Indisputably, Regular Civil Suit No 87/1972 filed by the predecessor of the respondents, for partition and for other reliefs was decreed. Preliminary decree for partition was passed on 25.11.1974. It appears from the record that during life time of predecessor of respondent, said decree was not executed. On 18.07.2018, respondents filed an application seeking precepts to be sent to the Collector, Osmanabad, for effecting actual partition as per the preliminary decree, passed on 25.11.1974. The Trial Court passed the order, thereby sending decree to the Collector, Osmanabad. The petitioners are aggrieved by this order.

4. According to the petitioners, they were not made party and without ascertaining the fact that whether the respondents were legal heirs of decree holder and without hearing the applicants, the Trial Court has sent the decree to the Collector, Osmanabad.

5. The learned advocate for the petitioners claimed that as per Article 136 of the Limitation Act, a decree has to be executed within a period of 12 years from the date of passing of decree. The application filed by the respondents was, therefore,

beyond limitation and could not have been entertained by the Trial Court. He therefore, seeks setting aside of the impugned order and dismissal of the application.

6. The learned advocate for the respondents, on the other hand, supported the impugned order by placing reliance on *Bikoba Deora Gaikwad and Others Vs. Hirabai Marutirao Ghorgare* [(2008) 8 SCC 198] and *Kattukandi Edathil Krishnan and Another Vs. Kattukandi Edathil Valsan and Others* [Civil Appeal Nos. 6406-6407 of 2010].

7. In *Bikoba Gaikwad* (supra), the Apex Court has dealt with the point raised in the present petition. It is held:

"11. 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 Order 26 Rule 13 of the Code and/or Section 51, Order 21 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. Section 54 only provides for ministerial functions of a court. It cannot be termed to be an execution proceeding.

12. 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. (See Ramanathan Chetty v. Alagappa Chetty)."

8. Said position is reiterated in *Kattukandi Krishnan* (supra). It is held:

"30. It is clear from the above that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually petitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. Thus, fundamentally, the distinction between preliminary and final decree is that:- 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 preliminary decree and after the inquiry having been conducted and rights of the parties being finally determined, a final decree incorporating such determination needs to be drawn up.

31. Final decree proceedings can be initiated at any point of time. There is no limitation for initiating final decree proceedings. Either of the parties to the suit can move an application for preparation of final decree and, any of the defendants can also move application for the purpose. By mere passing of a preliminary decree the suit is not disposed of. [See: Shubh Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 689; Bimal Kumar and Another v. Shakuntala Debi and Others (2012) 3 SCC 548].

32. Since there is no limitation for initiating final decree proceedings, the litigants tend to take their own sweet time for initiating final decree proceeding. _ _ _ _ _."

9. In the light of above ratio, it is clear that application filed under section 54, the Court is doing ministerial function and it cannot be termed as execution proceeding. The application filed before the Court to send decree and papers to the Collector to carry out partition, is not an application in execution and it cannot be termed as application for execution, and therefore, provisions of Limitation Act would not apply.

10. In the light of above, there is no substance in the challenge raised in the writ petitions. The petitions being devoid of merits, are dismissed.

[NITIN B. SURYAWANSHI, J.]