

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1468 OF 2018

Trimbak Kashinath Rajmane

..Petitioner
(Decree Holder)

Versus

Dattatraya Kashinath Rajmane
Since deceased through his legal heirs
Sanjay Dattatraya Rajmane and Ors.

..Respondents
(Judgment Debtors)

Mr. Ajay A. Joshi, for the Petitioner.

Mr. Sujeet R. Bugade, for the Respondent Nos.1(a) to 1(c).

CORAM : NITIN W. SAMBRE, J.

DATE : 19th APRIL, 2022

PC.

1. Counsel for the respondents/judgment debtors has raised a preliminary objection relying on the judgment of the Apex Court in the matter of *S. Rajeshwari Vs. S. N. Kulasekaran and Ors.* reported in *2006(4) Mh.L.J. 734* on the maintainability of the present petition. According to him, in view of provisions of Order XXI Rule 103 of the CPC, an appeal is maintainable. As a consequence, jurisdiction of this Court under Article 227 of the Constitution of India is ousted, as the order impugned has finally decided the execution proceedings for the following reasons :-

(a) That the status of the respondents/judgment debtors is that of

co-sharers in a partition decree which is under execution, as such, the claim that the petition is not maintainable pursuant to the provisions of Order XXI Rule 103 of the CPC cannot be accepted as the orders impugned cannot be termed to be one under the provisions of Order XXI Rule 98 or Rule 100 of the CPC. In the aforesaid background, reliance placed on the judgment of the Apex Court in the matter of *S. Rajeshwari (cited supra)* will be of hardly any significance, particularly, when the issue before the Apex Court in the said matter was in relation to the maintainability of an objection and the consequential remedy provided to a purchaser of the suit property and not in relation to the judgment debtors to a partition decree.

(b) There is one more reason for overruling the aforesaid objection. The respondents/ judgment debtors have remained unsuccessful in an initial challenge to the preliminary decree for partition and also in second round of litigation viz. challenge in Second Appeal upto this Court. As such, the judgment and decree under execution has attained finality against the respondents upto this Court. Once the Court below has exercised powers under Section 47 of the CPC while deciding the objection of the judgment debtors and that prayer of the decree holder for permission to supply stamp papers, it cannot be said that the jurisdiction of this Court under Article 227 of the Constitution of India is ousted.

2. Impugned in the present petition are the orders passed

by the Executing Court whereby the prayer of the petitioner/decreed holder for permission to deliver the stamp duty so as to get the final decree for partition certified came to be rejected vide order impugned dated 22nd September, 2014 passed below Exh.97 in Regular Darkhast No.26 of 2007. Another order impugned dated 07.10.2014 passed below Exh.101 whereby the objection raised by the respondents/judgment debtors came to be accepted and the decree proceedings being Regular Darkhast No.26 of 2007 are ordered to be closed.

3. I have already observed herein-above that the respondents/judgment debtors have remained unsuccessful in challenge to the preliminary decree for partition and also in second round of litigation viz. challenge in Second Appeal upto this Court.

4. The contentions of counsel for the respondents are the Court below was justified in ordering closure of Regular Darkhast as the defects which were pointed out in the nature of not taking steps for varying shares of the decreed holder in view of death of one of the party to the decree, non-payment or non-deposit of stamp duty, illegal appointment of Court Commissioner viz. non-technical expert (advocate) has rightly prompted the Court below to pass the order impugned.

5. I have appreciated the said contentions.

6. It is settled position of law that in partition suit, the final

decree cannot be said to have attained finality in execution, unless two conditions are satisfied i.e. (a) that a final decree under the signature of the Court passing such decree is signed and delivered; and (b) such final decree is stamped/certified on stamp paper of appropriate valuation under the provisions of Maharashtra Stamp Act. Appropriate support can be drawn from the judgment of the Apex Court in the matter of ***Shankar Balwant Lokhande Vs. Chandrakant Shankar Lokhande*** reported in ***AIR 1995 SC 1211***.

7. As far as the issue of drawing of partition decree on stamp papers with an appropriate value supplied by the decree-holder is concerned, requirement of the same is not disputed by the Petitioner. Rather the Petitioner has supplied the said stamp papers (may be by not moving an independent miscellaneous civil application seeking permission of the court below), however such act cannot be considered to the detriment of decree-holder so as to give leverage to the trial to dismiss the execution itself, as same, in my opinion, is a curable defect. The executing court have been sensitive to the fact that the stamp papers with an appropriate value for drawing partition decree was supplied during the course of hearing of the execution proceedings. It is not the case of the Respondent that the stamp papers were not supplied in appropriate value thereby not valuing the claim in the decree. As such the decree of partition has to be termed as an instrument of partition, being a conveyance is rightly valued by the Petitioner by paying appropriate stamp duty.

8. In view of above, the Petitioner was justified in drawing support from the Judgment of the Hon'ble Apex Court in the matter of *Shankar Lokhande (cited supra)*.

9. That being so, the order dated 22nd September, 2014 passed below Exh.97 is hereby quashed and set aside. Application Exh.97 stands allowed in terms of prayer clause (a) in the said application.

10. As far as challenge to the order dated 07.10.2014 is concerned, the fact remains that the shares of deceased coparcener or shareholder to a partition decree can be varied in the execution proceedings of partition decree. Such shares can be varied either at the instance of the decree holder or such other persons who are claiming re-division of the shares being legal heirs of the deceased judgment debtor to a partition decree. In that view of the matter, once the statute provides for a remedy of varying the shares even at the stage of the execution of the final decree, Court below, in my opinion, has committed an error in ordering closure of the Darkhast proceedings. If we peruse the prayer made in the application Exh.101, the respondents themselves have prayed that re-determination of share if not carried out at the behest of the decree holder, judgment debtor be permitted to move for reallocation of such share in view of death of one of the coparcener or shareholder.

11. In the aforesaid background, order impugned to the extent of ordering closure of the Regular Darkhast No.26 of 2007 is

not sustainable. As such, it is ordered that the order closing Regular Darkhast No.26 of 2007 is hereby quashed and set aside. The objection raised by the respondents at Exh.101 stands partly allowed. The objector is permitted to move before the Executing Court for getting the shares redetermined in view of death of one of the judgment debtor as is canvassed before this Court.

12. Since the decree has remained unexecuted, hearing of the same is expedited.

13. The petition stands allowed in above terms.

[NITIN W. SAMBRE, J.]