

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.432 OF 2022
WITH
INTERIM APPLICATION NO.3292 OF 2022
IN
SECOND APPEAL NO.432 OF 2022**

Yusuf Nabiso Tamboli (Decd. Through Lrs)
Jubeda Y. Tamboli and Ors.

... Appellants

Versus

Bapu Nabiso Tamboli Through Lrs.
Smt. Jaybun B. Tamboli and Ors.

... Respondents

....

Mr. Shashank Vangle i/by Mr. Balwant V. Salunkhe, for the Applicant.

....

**CORAM : NITIN W. SAMBRE, J.
DATED : 14th NOVEMBER, 2022**

P.C.:

1. Heard.
2. The present Second Appeal is filed by the legal heirs of the defendant No. 1 in R.C.S. No. 268 of 1979 which was for partition and separate possession of the house property.
3. The suit was decreed on 25th January 1991 awarding 7/24 share. I am informed that the appeal being Regular Civil Appeal No. 148 of 1991 was preferred by defendants i.e. the present appellants,

which was also dismissed as a sequel of final decree proceedings being application No. 3 of 2001 was taken up. The said execution proceedings were objected by the appellants herein. The said objection was rejected vide order dated 20th April, 2021 passed by Executing Court ie. Civil Judge Junior Division, Miraj which was affirmed in Regular Civil Appeal No. 7 of 2014 vide judgment and order dated 1st April, 2021.

4. The question of law which the appellants intended to canvass is in the final decree proceedings the Executing Court has appointed three different Commissioners. According to them the Court Commissioner has already informed the Executing Court that the decree is not executable as a sequel of which after selling the property shares in the monetary form were to be disbursed in proportion.

5. As such, he would urge that once the Court Commissioner has formed an opinion that the partition decree cannot be executed it was not open for the Executing Court to by-pass such report of the Court Commissioner and appoint another Court Commissioner. As such, the question of law which the Counsel for the appellants would urge that the Executing Court has committed an error in directing the Execution of the Decree vide the Court Commissioner's report at

Exhibit-63 which was in contravention to the two reports of the other Court Commissioner.

6. I have appreciated the said submissions.

7. The fact remains that the Court Commissioner is appointed pursuant to the provisions of Order XXVI of Civil Procedure Code, which has even applicability to the executing proceedings. A partition decree in a suit has to be executed in terms of the scheme provided pursuant to the provisions of Section 54 of the Code of Civil Procedure.

8. The report of the Court Commissioner as provided under Order XXVI Rule 10 Sub-Rule 2 provides same to be an admissible piece of evidence unless so objected and proved.

9. Admittedly, there are reports of the Court Commissioner before the Executing Court.

10. The Court Commissioner Mr. K.B. Gheware in his report at Exhibit-26 has recommended appointment of the expert i.e. a City Survey Officer as a Court Commissioner. Pursuant to the same the Executing Court has appointed City Survey Officer as a Court Commissioner who has given report at Exhibit-63.

11. Admittedly, neither the appellants nor the respondents have

questioned the report of the Court Commissioner by cross-examining him and as such, the said report of the Court Commissioner is rightly so accepted as an evidence by the Executing Court. As such, both the orders of the Executing Court so also the Appellate Court appears to be in tune with the provisions of Section 54 and Order XXVI Rule 10 sub rule 2 of the Code of the Civil Procedure.

12. Apart from above, the fact remains that the parties are litigating for their rights since 1979. As such, in my opinion, the present Second Appeal which sans involvement of question of law is dismissed, with directions to the Executing Courts to take the final decree proceedings to its logical end expeditiously if so required by ignoring the unnecessary objections if any by the parties concerned. Let the final decree proceedings be concluded within three weeks from the date of order.

13. In view of dismissal of Second Appeal, Interim Application also stands disposed of.

(NITIN W. SAMBRE, J.)