

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

WRIT PETITION NO.1981 OF 2019

1. Gulabrao Adinathrao Sonpethkar
Age : 64 years, Occu : Pensioner & Agri
2. Ashok Adinathrao Sonpethkar
Age : 58 years, Occu : Agri
3. Vikas Adinathrao Sonpethkar
Age : 46 years, Occu : Agri
4. Vimal Adinathrao Sonpethkar
Age : 52 years, Occu : Agri

All R/o. Village Niwali, Tq. & Dist. Latur

.. Petitioners

Versus

1. Sau. Dhanashri @ Rekha Gulabrao Sonpethkar,
Age : 60 years, Occu : Household
2. Virbhawal Gulabrao Sonpethkar
Age : 38 years, Occu : Agri
3. Vijayrath Gulabrao Sonpethkar
Age : 36 years, Occu : Agri
4. Rajubai Adinathrao Sonpethkar
Died during pendency of execution
petition her LRs already on record.
5. Sau. Trishala Shyam Wadgaonkar
Age : 56 years, Occu : Household,
R/o. Panegaon, Tal. Ambad, Dist. Jalna.
6. Sau. Sharada Laxman Sawale
Age : 50 years, Occu : Household
R/o. Ridore, Tal. Madha, Dist. Solapur.

.. Respondents

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Mr. Rajiv B. Deshmukh, Advocate for Petitioner
Mr. Sachin S. Deshmukh, Advocate for Respondent Nos.1 to 3

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 03-01-2023

ORAL JUDGMENT :

. Heard. Rule. It is made returnable forthwith. Mr. Sachin S. Deshmukh, learned advocate waives service on behalf of respondent nos.1 to 3. At the joint request of the learned counsel appearing for the parties, the matter is heard finally at the admission stage.

2. By this petition filed under Article – 227 of the Constitution of India, petitioners seek quashing of the order dated 16.01.2019 passed by the 4th Jt. Civil Judge Senior Division, Latur in Regular Darkhast No.18 of 2009. Petitioners herein are original defendant nos.1 to 4 and respondent nos.1 to 3 are original plaintiffs. Respondent no.4 (original defendant no.5) expired during pendency of the execution proceedings and respondent nos.5 and 6 are original defendant nos.6 and 7. For the sake of convenience, the parties are referred as per their status before the Trial Court.

3. Plaintiffs had filed the suit bearing R.C.S. No.358 of

2002 before the 3rd Jt. Civil Judge Junior Division, Latur seeking partition and mesne profit. Plaintiff no.1 is the wife of defendant no.1 and the plaintiff nos.2 and 3 are their children. Defendant nos.2 to 4 are brothers of defendant no.1 and defendant nos.6 and 7 are sisters of defendant nos.1 to 4. It was the case of plaintiffs in the suit that the parties were the members of the joint family and defendants are the legal heirs of one Adinathrao Baliram Sonpethkar, who expired in April - 2002. The joint family properties enumerated in the plaint are as follows:

Landed property at Village Nivli Tq. & Dist. Latur			
Sr.	Gat No.	Total Area H = R	Claimed area H = R
01	186	08=60	4=30
02	237	1 = 14	1 = 14
03	345	09=43	4=43
04	397	16=63	20=20
House property at Village Nivli Tq. & Dist. Latur			
Sr.	G.P House No.	Area	
01.	42	54 x 22 Ft.	
02.	385	40 x 27 Ft.	
03.	655	33 x 33 Ft.	

4. There was dispute between plaintiff no.1 and defendant no.1. It was the case of plaintiffs that there was a partition of the

suit properties and a share came to be allotted to defendant no.1 in the partition in which plaintiffs claimed 3/4th share. The claim was resisted by defendants and by judgment and decree dated 31.03.2005, the suit was partly decreed with the following order:

‘O R D E R

1. Suit is partly decreed.
2. Suit properties, be partitioned amongst defendants No.1 to 7 and plaintiffs have 3/4th share in share allotted to defendant no.1.
3. Plaintiffs no.1 to 3 have 3/4th share, in the share of defendant no.1, in each gat no.183 adm. 4 H 30 R. in land gat no.237 1H 14R, in land gat no.345 adm. 4H 43R and the house properties as described in plaint.
4. Decree be sent to Collector, Latur for partition.
5. Court Commissioner, be appointed to partition house properties, amongst the parties.
6. Separate inquiry be made U/O. 20, R 12 (C) of C.P.C. in respect of mesne profits.
7. Parties to bear their own costs.
8. Preliminary decree be drawn accordingly.’

5. On 02.08.2018 the order was sent to the Collector, Latur for effecting partition under Section 54 of the Code of Civil Procedure (hereinafter in short ‘CPC’). After measurement of land by T.I.L.R., the Tahsildar by order dated 02.08.2018 directed the Circle Inspector, Murud to handover the possession of 3/4th share in the suit lands jointly to plaintiffs.

6. An objection petition was filed by defendant nos.1 to 4, 6 and 7 objecting to the share of plaintiffs on the ground that defendant no.5 - Rajubai had expired on 09.12.2010 and in the decree she was allotted 1/7th share in the suit properties and according to Hindu Succession Act her share devolved upon her sons and daughters and as the other heirs of defendant no.5 - Rajubai had relinquished their share in favour of defendant nos.3 and 4 i.e. Vikas and Vimal, the plaintiffs are entitled to only 3/20th share. After hearing the parties, the Executing Court passed order dated 16.01.2019 clarifying the allotment of shares and allotted 1/18th share each to the Plaintiffs in the suit property.

7. Heard the learned counsel appearing for the parties.

8. Learned counsel for petitioners submitted a note regarding calculation of shares. According to the learned counsel for petitioner as Defendant No 1- Gulabrao had relinquished his share in favour of Vikas and Vimal, his 1/42th share in 1/7th share of Defendant No 5-Rajubai cannot be given to plaintiffs and plaintiffs are entitled to 1/20th share each.

9. Per contra, the learned counsel for respondents supported the impugned order and submitted that as per the decree

what was allotted to the plaintiffs was 3/4th share in the share of defendant no.1 and the relinquishment deed, if any, is not binding on the plaintiffs. He further submits that the entire exercise of raising objection has been undertaken by petitioners only to prolong the partition of the suit property as per the decree. He would urge this Court to award exemplary cost as in spite of the decree being passed in the year 2002 due to the various objections raised by petitioners the partition has not yet been effected.

10. I have considered the rival submissions of the parties. By order dated 31.03.2005 passed by the 3rd Jt. Civil Judge Junior Division, Latur in Regular Civil Suit No.358 of 2002, the plaintiffs were awarded 3/4th share in the share of defendant no.1, which order has attained finality as the petitioners have not challenged the same. The issue in the present case revolves upon calculation of shares which is to be allotted to plaintiffs in view of the subsequent event of the demise of Defendant No 5- Rajubai. The entire effort on the part of petitioners is to demonstrate that the share of Rajubai which would otherwise devolve upon defendant nos.1 to 4, 6 and 7 in accordance with Section 15 of the Hindu Succession Act will now be allotted only to Vikas and Vimal as the other defendants and in particular, defendant no.1 has relinquished his share in favour of

Vikas and Vimal. In the suit which has been decreed plaintiffs have been granted 3/4th share in the share of defendant no.1 and in my view upon death of Defendant No 5-Rajubai her share devolved upon petitioner no.1 - Gulabrao to the extent of 1/42nd share and only in order to defeat the rights of plaintiffs, the relinquishment deed has been executed by defendant no.1. Plaintiffs are not parties to the said relinquishment deed and said deed is not binding upon plaintiffs.

11. The scope of Section 47 of the CPC is very limited and the Executing Court cannot go beyond the decree and has to determine the shares of the parties in accordance with the decree, which is put into execution before it. Considering the said position, the Executing Court has determined the shares in para no.17 as follows:

“17. Deceased Adinathrao, defendants/J.Ds. Nos.1 to 5 will get 1/6th share each. Share of deceased Adinathrao will devolve upon defendants/ J.Ds. Nos.1 to 7. therefore, defendants/ J.Ds. Nos.1 to 7 will get 1/42th share each of share of deceased Adinathrao. In the year 2010, defendant no.5 died. Therefore, her $1/6\text{th} + 1/42\text{th} = 4/21^{\text{th}}$ share will devolve upon defendant nos.1 to 4, 6 and 7 and therefore, defendants/ J.Ds. Nos.1 to 4, 6 and 7 will get $2/63\text{th}$ each share of deceased defendant / J.D. No.5. Defendants / J.Ds. Nos.1 to 4 will get $1/6\text{th} + 1/42\text{th} + 2/63\text{th} = 2/9\text{th}$ each. Defendants / J.Ds. Nos.6 and 7 will get $1/42\text{th} + 2/63\text{th} = 1/18\text{th}$ each.”

12. In my opinion, by the preliminary decree in the partition suit, the share of the parties had been finally decided and in case of

any challenge to the said apportionment of shares in the preliminary decree on account of subsequent event, the Petitioners were required to adopt appropriate proceedings for modification of the shares in the preliminary decree and not by way of objection under Section 47 of the Code. The issue of shares of the parties cannot be reopened in execution proceedings and the Executing Court has rightly determined the shares of plaintiffs in accordance with the decree qua defendant no.1.

13. Writ Petition is devoid of merits and is accordingly dismissed. Rule is discharged.

(SHARMILA U. DESHMUKH, J.)