

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

WRIT PETITION NO. 12956 OF 2023

1. Kanchanbai Balkisan Mundada
Age : 46 years, Occ.: Business,
R/o. House No.127, Polan Peth, Jalgaon.
2. Radhika Radheshyam Mundada
Age : 38 years, Occ.: Business,
R/o : As above.
3. Ritesh Radheshyam Mundada
Age : 19 years, Occ.: Education,
R/o : As above.
4. Kausalyabai Ramkisan Mundada
Age : 65 years, Occ.: Household,
R/o : As above.
5. Sunil Ramkisan Mundada,
Age : 52 years, Occ.: Business,
R/o : As above.
6. Jitendra Ramkisan Mundada,
Age : 46 years, Occ.: Business,
R/o : As above.
7. Bharat Ramkisan Mundada,
Age : 44 years, Occ.: Business,
R/o : As above.
8. Suchita Gopal Mal
Age : 48 years, Occ.: Business,
R/o : Lakhpati Galli, Shegaon,
Taluka and District Buldhana.
9. Manisha Rajesh Baser
Age : 47 years, Occ.: Household,
R/o : Plot No.83, Yashwantnagar, Jalgaon.

...Petitioners

Versus

1. Mangalabai Kachrual Mundada
Since deceased
2. Manjula Kachrual Mundada
Age : 41 years, Occ.: Lawyer,
R/o : House No.127, Polan Peth,
Jalgaon.
3. Saroj Kachrual Mundada
Age : 28 years, Occ.: Nil,
R/o : As above.

...Respondents

Advocate for Petitioners : Mr. Bora Satyajit S.
Advocate for Respondent No.2 and 3 : Mr. D. A. Madake

CORAM : SHAILESH P. BRAHME, J.
RESERVED ON : 2nd NOVEMBER 2023
PRONOUNCED ON : 10th NOVEMBER 2023

JUDGMENT :

. Heard learned counsel for the respective sides finally. The respondents have placed on record affidavit-in-reply to contest the petitioners.

2. The order dated 02.09.2023 passed below Exhibit-102 in Civil Miscellaneous Application No.121/2018 by the learned 3rd Joint Civil Judge, Senior Division, Jalgaon is questioned in this petition. The petitioners are the judgment debtors and the respondents are decree holders. The judgment and decree dated 30.01.2018 passed by the learned 5th Joint Civil Judge, Senior Division, Jalgaon in Special Civil Suit No.132/2010 for partition and possession is under execution.

3. A preliminary decree is passed in the Special Civil Suit No.132/2010 allotting 1/3rd share. The respondents are allotted together 1/3rd share. The suit property is three storied residential building having shops at the ground floor.

4. The respondents have filed Civil Miscellaneous Application No.121/2018 for final decree. They further filed application (Exhibit-90) for appointment of Court Commissioner which was allowed by order dated 01.03.2023. An exhaustive directions were issued to the Court Commissioner for carrying out the partition by metes and bounds. He was given liberty to take assistance of Civil Engineer or Architect.

5. Accordingly learned Advocate Mr. Subhash Chavan, a Court Commissioner conducted inspection sought assistance of Civil Engineer Mr. Tushar Mistri and prepared detail report with maps. The maps are prepared showing partition of 1/3rd share each to the litigating parties. He suggested the partition by report at Exhibit-100 for all the floors of the subject matter. The petitioners submitted Say on 20.06.2023 and raised various objections. The partition suggested by the Court Commissioner vide his report is stated to be not acceptable. The predominant grievance of the petitioners is for carving out three shops at the ground floor by effecting structural changes.

6. The respondents submitted application (Exhibit-102) for

partitioning the property as per the report of the Commissioner (Exhibit-100) and claimed possession of their share. By the impugned order, the learned Judge issued possession warrant under Order XXI Rule 35 of the Civil Procedure Code for possession of the suit property. The assistance of Architect or the Civil Engineer is also permitted, if required.

7. The learned counsel for the petitioners submits that the application for final decree proceeding still pending. The petitioners objected the report of the Commissioner (Exhibit-100). When there are serious objections for effecting partition by metes and bounds as per the report, issuing possession warrant directly, is without jurisdiction and arbitrary. He submits that the structural changes suggested by the Commissioner are not viable and detrimental to the entire subject matter. It is not possible to execute the decree as suggested by the Commissioner.

8. He further submits that unless there is hearing and consideration of the objection raised by the petitioners to the Commissioner's report, it is impermissible to issue possession warrant. He vehemently submits that unless and until the structural changes suggested by the Commissioner for partitioning the property are carried out, no party can claim possession.

9. The learned Counsel appearing for the respondents would support impugned order. According to him, Commissioner's report was prepared after soliciting the technical assistance of Engineer. Due procedure was followed for preparing report suggesting partition. He submits that an equitable partition is suggested after considering all the aspects of the matter, which cannot be faulted. He further submits that the petitioners have failed to file Say to the Commissioner's report in time. He would point out that there is no Say filed by the petitioners to the application Exhibit-102. Lastly it is submitted that the petitioners are protracting the matter by depriving answering respondents for decree.

10. There is no dispute amongst the parties for the decree passed in the Special Civil Suit No.132/2010. Three branches are entitled to 1/3rd share each. A three storied building is the subject matter of decree of partition. At the ground floor, presently there are two shops. A Commissioner's report is filed at Exhibit-100 alongwith maps of each floor, suggesting structural changes. It appears that assistance of technical expert i.e. Civil Engineer is taken by the Court Commissioner before preparing map.

11. The petitioners have objected report of the Commissioner (Exhibit-100) by submitting Say at Exhibit-103 on 20.06.2023. In

paragraph no.5 of the Say, the concern is expressed that to effect the structural changes as suggested by the Commissioner is detrimental to the building.

12. After submitting Say, the learned trial Judge is expected to consider the rival submissions in final decree proceeding. As the preliminary decree is for the partition, the Court has to take into account the report of the Commissioner for effecting partition by metes and bounds. The structural changes suggested by the Commissioner or modified thereafter have to be physically carried out. After executing the structural changes, the subject matter becomes ready for handing over equitable shares to the parties. I find that all these stages are missing in this matter.

13. The respondents submitted application (Exhibit-102) for issuing possession warrant of their shares and by the impugned order, the possession warrant is issued as if the structural changes suggested by the Commissioner have been carried out and the shares are ready for the allotment. The impugned order is premature and it is without jurisdiction. The petitioners have rightly contended that the Commissioner's report is accepted as a gospel truth and without carrying out the structural changes, possession warrant is issued.

14. I find that the learned Judge has made undue haste in issuing possession warrant. For want of due procedure of law to execute decree of partition, impugned order is liable to be quashed and set aside. I, therefore, pass following order :

ORDER

- i. The order dated 02.09.2023 passed below Exhibit-102 in Civil Miscellaneous Application No.121/2018 is quashed and set aside.
- ii. The learned trial Judge shall adopt due procedure of law for carrying out the structural changes for effecting partition by metes and bounds.
- iii. Accordingly the writ petition is allowed.

[SHAILESH P. BRAHME, J.]

Najeeb.