

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

34 WRIT PETITION NO.14746 OF 2019

**BAJIRAO SOPANRAO GONDKAR DIED LRS.
LAHANUBAI BAHIRAO GONDKAR AND OTHERS
VERSUS
DIGAMBAR TULSHIRAM GONDKAR AND OTHERS**

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Advocate for Petitioners : Mr. Sanket S. Kulkarni
Advocate for Respondent No.1 : Mr. Y.S. Choudhari
Advocate for Respondent No.2 : Mr. Shaikh Majit S. h/f.
Mr. S.S. Deshmukh

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 11-01-2023

PER COURT :

. Heard the learned counsel appearing for the parties.

2. By this petition, the petitioners are challenging the order dated 02.11.2019 passed by the Executing Court in final decree Application No.03 of 2019 whereby their application for executing the decree dated 21.07.2012 and for handing over their ½ share by appointing Court Commissioner came to be rejected.

3. The facts of the case are that Special Civil Suit No.133 of 2010 came to be filed by the petitioners herein for partition and separate possession of house property bearing CTS No.619, admeasuring 150.8 sq. meters on the ground that the said property

had been kept common between the petitioners and father of respondent nos.3 and 4. In the said Special Civil Suit No.133 of 2010 only the respondent nos.3 and 4 were impleaded as party defendant. The trial Court while deciding the Special Civil Suit No.133 of 2010 framed issue no.1 and 9 and recorded its findings as follows :

ISSUES	FINDINGS
1. Do plaintiffs prove that suit property was kept joint between them and defendant No.1 and as such they have their one-half share therein?	.. Yes.
9. Whether the prayer of partition amounts to partial partition? If yes, whether the suit for partial partition is tenable?	.. No.

4. The trial Court answered issue no.1 ‘in the affirmative’ and issue no.9 ‘in the negative’. By judgment and decree dated 21.07.2012, the shares of Petitioner’s branch and the Respondent Nos 3 and 4’s branch was determined as one-half and the Petitioner’s one half share was directed to be partitioned and given in separate possession by appointing Court Commissioner. The judgment and decree dated 21.07.2012 was subject matter of challenge till the Apex Court and has attained finality. Subsequently, final decree proceedings were initiated by the petitioners. In the meantime, the respondent nos.1 and 2 belonging to the Respondent No 3 and 4’s branch of family filed application for participating in the final decree

Application No.3 of 2019 claiming rights in the half share of the respondent no.3 in the suit property, which was allowed. The impleadment of Respondent No 3 and 4 in the Final Decree proceedings was challenged by the Petitioners in this Court. Considering the judgment in the case of **Phoolchand and another vs. Gopal Lal**, AIR 1967 Supreme Court 1470 this Court by order dated 25.03.2019 in Writ Petition No.5028 of 2018 held that the coparceners, who have been left out, can be permitted to participate in the final decree proceedings and their rights would flow from that branch of the family under which they appear in the family tree. The issue would be as regards the final decree taking shape after considering the rights of all those coparceners who have been party to the original suit or such coparceners who have been left out. This Court also observed that the Court dealing with the final decree application is bound to consider two branches of the families and would accordingly define the shares of the parties falling under the respective branches. Worthwhile to note that this Court directed the final decree application to be adjudicated upon as expeditiously as possible and preferably on or before 31.12.2019.

5. By application dated 08.01.2019, the Petitioners applied to the Executing Court to partition and hand over the one half share

of the Petitioner, which was objected by the Respondents on the ground that this Court in Writ Petition No 5028/2018 has directed the Petitioner to implead all coparceners. The Executing Court by order dated 02.11.2019 observed that although as per the decree one half share of the Petitioners and the Respondent Nos 3 and 4 were determined, the shares of each of the coparcener is required to be determined. It was further observed that one Dr Shalaka Kavde from the Petitioner's branch of family has filed independent suit for determination of her share and considering the geneology, the Petitioner who is part of Sopan's branch of family cannot be said to represent Sopan's branch of family and considering the order of this Court dated 23.09.2019, unless all the parties are included in the final decree application, the shares cannot be partitioned.

6. Learned counsel for the petitioners submits that the Executing Court has failed to notice the observation of this Court that in the final decree application, the Court is bound to consider the two branches of the families and accordingly define the shares of the parties falling under the respective branches. As such, he would urge that as far as his branch of the family is concerned, there is no application made by any person from his branch claiming share in the one half share of the Petitioner. He would submit that as issue no.1

has been framed and answered in the affirmative by the trial Court, the Executing Court ought to have partitioned his half share of the property and has pointed out that in the preliminary decree, the share has been allotted to the father of the Respondent No 3 and 4.

7. Per contra, the learned counsel for respondent nos.1 and 2 submits that unless and until all the coparceners are joined in the final decree proceedings, the partition cannot be effected. He has invited attention of this Court to the family tree which has been reproduced at page 81 of the writ petition and would urge that all the coparceners from the branch of the respondent nos.3 and 4 ought to have been joined by the petitioners.

8. I have considered the rival submissions of the parties.

9. A specific issue was framed by the trial Court and it was answered in the affirmative that the suit property which is the house property was kept joint between the petitioners and the respondent nos.3 and 4 and the share of the petitioners and the respondent nos.3 and 4 have been defined as $\frac{1}{2}$ share therein. The respondent nos.1 and 2 claiming to be coparceners from the branch of respondent nos.3 and 4 are party to the final decree proceedings. By order of this

Court dated 25.03.2019, this Court permitted the coparceners who have been left out to participate in the final decree proceedings. The admitted position today is that apart from respondent nos.1 and 2, none of the other coparceners have filed any application for participating in the final decree proceedings. The contention of the learned counsel for the respondents that all the coparceners of the two branches of the families ought to be joined in the final decree proceedings cannot be countenanced in view of issue no 1 framed by the trial court and specific decree passed by the trial Court whereby the petitioners and the respondents have been held entitled to $\frac{1}{2}$ share in the suit property.

10. In my opinion, on careful reading of the order of this Court dated 25.03.2019, this Court directed the Executing Court to consider the two branches of the families and accordingly define the shares of the parties falling under the respective branches and there is no direction to the Petitioner to implead all the coparceners in the final decree proceedings. The decree dated 21.07.2012 determined the Petitioner's one half share and the rights of the petitioner to possession of one half share cannot be kept in abeyance, particularly when there is no participation in the final decree proceedings from Petitioner's branch of family. The rights of the parties from the

Respondent Nos 3 and 4's branch of family will have to be determined out of their one half share.

11. Here is a case where the original suit was filed in the year 1993 and in spite of judgment and decree of the year 2012, the Petitioners are unable to reap the benefits of the decree even after lapse of 11 years from the date of the decree in their favour. Learned counsel for respondent nos.1 and 2 is attempting to canvass the rights of other coparceners who have not participated in the final decree proceedings and every attempt is being made to stall the final decree proceedings.

12. The preliminary decree has declared the shares of the parties and the property is required to be partitioned in accordance with those shares by Commissioner appointed in this behalf. The preliminary decree declares the share of the Petitioner to be one-half share and the partition has to be effected in accordance with the declaration of share.

13. It is also required to be noted that the original suit is of the year 1993 and by the order dated 25.03.2019, this Court had directed the final decree application to be adjudicated upon as expeditiously

as possible and preferably on or before 31.12.2019.

14. In my view, the order of the Executing Court dated 02.11.2019 declining to partition the property unless all the coparceners are impleaded is passed on mis-reading of the order of this Court dated 25.03.2019 and is liable to be quashed and set aside.

15. The Executing Court is directed to partition the property in accordance with the shares declared by the preliminary decree. Writ petition is accordingly allowed in the above terms.

16. At this stage request is made by the learned counsel for the respondents for stay of this order for a period of four weeks. Request made by learned counsel for the respondents is opposed by the learned counsel for the petitioners. In the interest of justice, this order is stayed for a period of four weeks.

(SHARMILA U. DESHMUKH, J.)

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