

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6231 OF 2022

NIKITA
KAILAS
DARADE
Digitally signed by
NIKITA KAILAS
DARADE
Date: 2023.11.06
17:59:03 +0530

Raju Mhalappa Khandekar and Anr. ... Petitioners

V/s.

Shankar Tukaram Kokare and Ors. ... Respondents

Mr. Samir A. Kumbhakoni for the Petitioners.

Mr. Somnath Thengal i/b Mr. Prasad P. Kulkarni for
Respondent Nos. 1 and 4.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 6, 2023

P.C.:

1. The petitioner is challenging order passed by the Appellate Court in exercise of power under Order 41 Rule 3A of the Code of Civil Procedure, 1908 granting stay to the preliminary decree of partition during the pendency of the application for condonation of delay.

2. The petitioner is original plaintiff who filed Regular Civil Suit No.113 of 1998 seeking partition and possession of the suit property. The Trial Court by judgment dated 31st July 2008 decreed the suit in relation to property in paragraph No.1(e) of the plaint which is an agricultural land. The Trial Court, therefore, directed decree to be send to the Revenue Authorities under Section 54 of Code of Civil Procedure, 1908.

3. The purchaser of the property (defendant No.17) filed Civil Appeal No.206 of 2013 against the preliminary decree of partition. The Appellate Court by judgment and decree dated 31st July 2018 clarified the decree stating that the land purchased by defendant No.17 shall be allotted firstly to the share of the defendant No.1.

4. The defendant No.1 filed Miscellaneous Application No.178 of 2019 under Section 5 of the Limitation Act 1963 seeking condonation of delay in filing appeal against preliminary decree of partition. The Appellate Court in exercise of power under Order 41 Rule 3A of the Code of Civil Procedure, 1908 granted stay to the Trial Court's decree dated 31st July 2008 till the decision of the application for condonation of delay. The said order is subject matter of the present writ petition.

The learned advocate for the petitioner relying on the Judgment in the case of **Surinder Pal Soni Vs. Sohan Lal (dead) Through Legal Representatives** reported in (2020) 15 SCC 771 submitted that decree dated 31st July 2008 have not been modified by judgment and decree dated 31st July 2018. There is no enforceable decree in force which could have been stayed by the Appellate Court.

5. In my opinion, the legal proposition raised by the petitioner has no substance. In a suit for partition, and possession of immovable property, the Court passing the decree has option of passing preliminary decree or final decree. Such discretion depends upon nature of the property and nature of dispute between the parties. If the Court passes a preliminary decree, in

such decree, the Court adjudicates shares of the parties. In a final decree, the Court decides which portion of suit property to be allotted to which party to the suit. After adjudication of such rights in final decree proceedings, the successful parties are entitled to file application for execution. However, in relation to agricultural properties, no final decree is required as has been recognized by the Apex Court in the case of **Bhikoba Deora Gaikwad and Ors. Vs. Hirabai Mrutirao Ghorgare and Ors.** reported in (2008) 8 SCC 198 that in relation to land paying land revenue, the Court while exercising power under Section 54 of the Code of Civil Procedure, 1908 passes ministerial order.

6. In the facts of the case, from the decree passed by the Appellate Court in Appeal No.206 of 2013 dated 31st July 2018, the Appellate Court has passed a final decree without modification of shares of the parties. In absences of modifying shares of the parties, the preliminary decree passed by the Trial Court remains unchanged. Therefore, it is always open for the aggrieved party to challenge preliminary decree by way of appeal. Therefore, there is no substance in the objections raised on behalf of the petitioner that in view of modification of preliminary decree, the decree passed by the Trial Court is no longer in existence.

7. Since the preliminary decree passed by the Trial Court and particularly Clauses 2 to 4 thereof remain unaffected by judgment and decree dated 31st July 2018, in my opinion, the Appellate Court was justified in protecting the appellants during the pendency of delay condonation application.

- 8.** There is no error of jurisdiction nor the exercise of discretion by the Appellate Court suffers from any legal infirmity.
- 9.** In absence of miscarriage of justice, no interference under Article 227 of Constitution of India is called for.
- 10.** The writ petition stands disposed of. No costs.
- 11.** Considering the facts of the case, if the application for condonation of delay is pending, the application shall be decided on its merits within six weeks from today.
- 12.** If the Appellate Court condones the delay in filing the appeal, the appeal shall be decided within six months from today.

(AMIT BORKAR, J.)