

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

**WRIT PETITION NO. 1971 OF 2022
WITH
WRIT PETITION NO.1973 OF 2022
WITH
INTERIM APPLICATION NO.19386 OF 2022**

Vijay Shivram Pathare

Age – 44 years, Occu. - Agriculture

R/o. Karegaon, Tal. - Shrirampur,

Dist. - Ahmednagar-413717

... Petitioner

Versus

1. City Corporation Limited
Through Aniruddha Deshpande
Resident of Flat No 301/1-Modibagh,
Ganeshkhind Road, Pune.
2. Shri. Deepak Shivram Pathare
Age-Adult, Occupation - Business
Resident of Karegaon, Tal - Shrirampur
District Ahmednagar, Pin-413717
3. Shri. Yashwant Maruti Lonkar
[Deceased] Through his Legal Heirs
- 3.1 Shri. Kalidas Yashwant Lonkar
- 3.2 Shri. Devidas Balasaheb Lonkar
Both Residing at 55, Gandhi Chowk,
Mundhwa, Pune-411036
- 3.3 Shri. Pushpalata Vitthalrao Jadhav
Resident of Katewadi, Tal - Baramati
District - Pune 413 102
- 3.4 Surekha Rajendra Pawar,
Residing at Wadgaon, Ghenand,

Taluka-Khed, District-
Pune-410 501

- 3.5 Sharada Yashwant Surve
Resident of 135, Ganesh Peth,
SangulLane, Pune - 411 002
- 3.6 Shri. Achyut Yashwant Lonkar,
Resident of 55, Gandhi Chowk,
Mundhwa, Pune-411 036
- 3.7 Hirabai Kisanrao Ingle
Resident of Survey No. 22,
Lonkar Vasti, Ingle Nagar,
Keshav Nagar, Mundhwa,
Pune - 411 002
- 3.8 Shrimati Kamal Balasaheb Lonkar
Resident of 55, Gandhi Chowk,
Mundhwa, Pune-411 036
4. Uday Jagannath Ghodke
Through the Indian Electricity Company
Shukrwar Peth, Pune-411 002 ...Respondents

Mr. Nitin Gaware Patil, for Petitioner.

Mr. G. S. Godbole, Sr. Advocate a/w. Mr. S. B. Pawar, a/w. Mr. Amit Karle
a/w. Ms. Swati Sawant i/b. S. K. Legal Associates LLP for Respondent
No.1.

Mr. Rokde Narayan, for Respondent No.2.

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 04 SEPTEMBER 2023.

PRONOUNCED ON : 13 SEPTEMBER 2023.

JUDGMENT:

1. In a case where a dispute arises between claimants about succession to the estate allotted to a deceased decree-holder in a suit for partition, which forum would resolve such dispute and what would be the correct remedy to be adopted for resolution of such dispute are the issues which I am tasked upon to decide in this Petition.

2. The issues arise in the context of a challenge raised by the Petitioner-Vijay Shivram Pathare to the order dated 17 March 2021 passed by the Minister-Revenue, who has upheld the orders of Additional Divisional Commissioner, Additional Collector and Sub-Divisional Officer. Those revenue authorities had set aside Tehsildar's Order carving out share of deceased decree holder-Anjanabai and handing over possession thereof in favour of Petitioner. Both Petitioner-Vijay and his brother-Deepak claim right to succeed to the estate of Anjanabai. Respondent No. 1 is the successor-in-title of Deepak, who felt that Tehsildar's decision in handing over Anjanabai's share to Vijay pursuant to receipt of precept from Civil Court could be challenged before various revenue authorities. As against this, it is Vijay's contention that the correct remedy for Deepak's successor-in-title was to move the Executing Court for raising an objection to the Tehsildar's Order. Respondent No. 1 on the other hand contends that since substantive civil proceedings are pending between the parties, the issue of right to succeed

to Anjanabai's estate can be decided in those proceedings and therefore Tehsildar's Order needed to be set aside by higher revenue authorities.

3. For better understating of the controversy between rival parties, narration of checkered history of the case would be necessary. Anjanabai Dinkar Dhamdhere and Shantabai Wamanrao Sable were real sisters, who instituted Regular Civil Suit No.943 of 1987 against Yashwant Maruti Lonkar for partition of suit properties claiming $3/5^{\text{th}}$ share in the same. They also filed another Suit bearing R.C.S. No.1141 of 1987 for settlement of accounts of suit properties. The suit properties comprised lands bearing Survey No.31/2/8 adm. 01 H. 96 R and Survey No.26/8C/9/10 admeasuring 03 H. 8 R at Mundhwa, Keshavnagar, Pune. Both the suits were decreed by the Court of Civil Judge Junior Division, Pune on 31 July 1997 declaring that Plaintiffs-Anjanabai and Shantabai are entitled for possession of their $3/5^{\text{th}}$ share in suit property with a further direction to separate the shares from suit property and grant possession to them as per Section 54 of the Code of Civil Procedure (**Code**). The Defendant therein was also directed to pay Rs.450/- to Plaintiffs towards mesne profit with further direction to conduct inquiry for further amount of mesne profit. Preliminary decree was passed in R.C.S. No.943 of 1997 in respect of accounts.

4. Defendant Yashwant Maruti Lonkar filed Civil Appeal Nos. 911 of 1997 and 912 of 1997 before the District Court, Pune challenging the decree. By judgment and order dated 04 September

2001, the appeals were dismissed. The Defendant Yashwant Maruti Lonkar filed Second Appeal Nos.61 of 2002 and 62 of 2002 before this Court which came to be dismissed by this Court by judgment and order dated 10 June 2013. Special Leave Petitions filed by the Defendant Yashwant Maruti Lonkar were also dismissed by the Supreme Court by order dated 21 October 2013. Review Petition Nos.1219 of 2014 and 1220 of 2014 filed by Defendant Yashwant Maruti Lonkar were also rejected by the Supreme Court by order in the year 2014. The Curative Petitions were also dismissed on 23 February 2016. This is how decree passed by Trial Court on 31 July 1997 attained finality.

5. Petitioner-Vijay Shivram Pathare and Respondent Deepak Shivram Pathare are real brothers and grandsons of Plaintiff Anjanabai. For the sake of brevity, Petitioner is referred as 'Vijay' Respondent No.2 is referred as 'Deepak' and Plaintiff in the suit is referred as 'Anjanabai'.

6. Deepak claims that Anjanabai executed a Will on 22 December 2004 bequeathing her 3/10th undivided share exclusively in the name of Deepak. On the contrary, Vijay claims that Anjanabai executed Will bequeathing very same property in his. On 04 March 2005 Anjanabai died. After Anjanabai's death, mutation entry No.8362 was effected by which Deepak got his name mutated to the record of rights of the land, which came to Anjanabai's share. Deepak entered into registered development agreement with Respondent No.1-City Corporation Ltd. on 03 October 2005 and also executed a registered

power of attorney. At this stage, it would be necessary to describe the exact property which came to Ananabai's share as a result of Decree dated 31 July 1997, about which there is no dispute between the parties. Anjanabai's share of the land is (i) land adm. 80 R in land bearing Survey No.20/8/C+5+10 and (ii) land Adm. 70R in land bearing Survey No.31/2/8 at village Mundhwa, Gram Panchayat Keshavnagar, Taluka Haveli District Pune.

7. Eight years after execution of the development agreement and power of attorney, Deepak sought cancellation of both by issuing notice dated 02 March 2013. He also published public notice in newspaper on 03 March 2013 seeking revocation of development agreement and power of attorney. The notice was replied by City Corporation Ltd. contesting revocation / cancellation of development agreement and power of attorney. On 22 November 2013 the sale deed was executed between City Corporation Ltd. and Deepak (signed by Aniruddha Deshpande in capacity as Deepak's attorney) in respect of land in question. Based on that sale deed, mutation entry on 12367 was effected recording name of City Corporation Ltd. on the 7/12 extract.

8. In the meantime, City Corporation Ltd. also acquired share of Anjanabai's sister Shantabai Sable, which was initially purchased by Mr. Uday Ghodke vide sale deed dated 17 January 2014 who further transferred same in the name of City Corporation Ltd. vide sale deed dated 17 October 2017. This is how City Corporation Ltd. claims title

and possession in respect of land falling to the share of both Anjanabai and Shantabai.

9. Deepak instituted Special Civil Suit No.1669 of 2013 against City Corporation Ltd. seeking cancellation of sale deed dated 22 November 2013 based on power of attorney dated 03 October 2005. He also instituted proceedings for cancellation of mutation entry by which City Corporation's name was mutated to 7/12 extract. On 28 February 2014, the mutation entry was cancelled by the Circle Officer. In Deepk suit, the Trial Court rejected temporary injunction holding that City Corporation Ltd. is in possession of the land. City Corporation Ltd. challenged the decision of Circle Officer before Sub-Divisional Officer who set aside the Circle Officer's order 28 February 2014 restoring mutation entry No.12367.

10. In the meantime, Trial Court which had passed decree dated 31 July 1997 passed order on 27 January 2016 and directed sending of precept to the Collector, Pune under Section 54 of the Code.

11. On 07 June 2016 City Corporation Ltd. acquired share of Defendant Yashwant Lonkar through his legal heirs.

12. Under this background, Petitioner Vijay appeared on the scene for the first time in 2016 and challenged mutation entry No.8362 by which Deepak's name was mutated to 7/12 extract, by filing R.T.S. Appeal No.126 of 2016. To revisit the chronology, said mutation entry No.8362 was effected on 02 June 2005 after Anjanabai's death. Both

Vijay and Deepak relied on wills allegedly executed in their favour. The SDO however held that the revenue authorities could not decide the validity of will and dismissed Vijay's appeal. Vijay filed further appeal before Additional Collector which was allowed by order dated 26 December 2016. Mutation entry No.13580 was made deleting name of Deepak and adding name of Vijay.

13. After noticing that Vijay was claiming rights in the land on the strength of Will dated 17 February 2005, City Corporation Ltd. filed R.C.S. No.1275 of 2017 against Vijay challenging that Will.

14. An important development occurred in the matter of execution of decree dated 31 July 1997, which had *inter alia* directed separation of shares and grant of possession thereof to Plaintiff Anjanabai and Shantabai as per Section 54 of the Code. The Court had directed issuance of precept by order dated 27 January 2016. Collector nominated Tehsildar to act on the precept. Tehsildar passed order dated 28 November 2017 determining shares of Anjanabai and Shantabai and directed City Survey Officer to handover possession of Anjanabai's share in favour of Vijay and Shantabai's share in favour of Uday Jagannath Ghodke (from whom City Corporation Ltd. had purchased Shantabai's share on 17 October 2017). This is how a new battlefield opened between the parties on account of passing of order dated 28 November 2017 by Tehsildar. Now Vijay started aggressively ascertaining his rights over the suit property. By now he was armed with not only the order of

Tehsildar but also his name was recorded to the record of rights on account of mutation entry No.13580.

15. City Corporation Ltd., which had purchased the land in question through Deepak, felt aggrieved by Tehsildar's order dated 28 November 2017 and filed R.T.S. Appeal No.278 of 2017 before Sub-Divisional Officer. Appeal was allowed by Sub-Divisional Officer on 19 January 2018 setting aside Tehsildar's order. Vijay challenged Sub-Divisional Officer's decision before Additional Collector in R.T.S. Appeal No.140 of 2018, which was dismissed by order dated 23 August 2018. He thereafter approached Additional Divisional Commissioner challenging Additional Collector's order. However the revision was dismissed by order dated 24 December 2019. He thereafter carried the matter in revision petition before the Hon'ble Minister, Revenue, which also came to be dismissed by order dated 17 March 2021. This order dated 17 March 2021 is subject matter of challenge in the present petition filed by Vijay.

16. Before I proceed to record submissions of the learned counsels appearing for parties on correctness of the impugned order passed by the Minister-Revenue on 17 March 2021, a little update over other fronts of battle between the parties would be required. In R.C.S. No.1275 of 2017 instituted by City Corporation Ltd. against Vijay and Deepak, temporary injunction was granted restraining both Vijay and

Deepak from disturbing City Corporation's possession over land in question.

17. Petitioner Vijay in the meantime opened a third front of battle this time by approaching Civil Court at Shrirampur on 19 November 2018 and sought probate in respect of will allegedly executed in his favour by Anjanabai on 17 February 2005. By order dated 17 June 2019, the Civil Judge Senior Judge, Shrirampur issued probate of Anjanabai's will dated 17 February 2005 in favour of Vijay. After noticing grant of probate in favour of Vijay by Civil Court at Shrirampur, City Corporation Ltd. filed a Civil Miscellaneous Application No.08 of 2021 seeking revocation of probate granted in Vijay's favour. By order dated 25 October 2021, the Civil Court at Shrirampur allowed the application for condonation of delay. Vijay attempted to get the City Corporation's Civil Miscellaneous Application for revocation of probate rejected under Order 7 Rule 11 of the Code. But his application was rejected by order dated 08 August 2022. Vijay thereafter filed Civil Writ Petition No.10947 of 2022 before this Court, Bench at Aurangabad challenging Shrirampur Court's order dated 08 August 2022. This Court dismissed the Petition by its order dated 28 March 2023. This would complete update on various litigation fronts between the parties.

18. Thus, as of today following proceedings remain pending between the parties-

- i) Special Civil Suit No.1669 of 2013 filed by Deepak seeking cancellation of sale deed dated 22 November 2013 executed in favour of City Corporation Ltd. based on Power of Attorney dated 03 October 2005.
- ii) R.C.S. No.1275 of 2017 filed by City Corporation Ltd. against Vijay and Deepak challenging will dated 17 February 2005 allegedly executed by Anjanabai in Vijay's favour and seeking injunction against both Vijay and Deepak from disturbing City Corporation's possession over the land in question.
- iii) Civil Miscellaneous Application No. 08 of 2021 filed by City Corporation Ltd. seeking revocation of probate granted in Vijay's favour in respect of Anjanabai's alleged will dated 17 February 2005.
- iv) Present petition challenging order dated 17 March 2021 passed by Hon'ble Minister Revenue upholding order of Additional Divisional Commissioner, Additional Collector and SDO, who had set aside Tehsildar's order dated 28 November 2017 passed under provisions of Section 54 of the Code.

19) After having narrated the checkered history of the case now I proceed to record submissions canvassed by both the sides.

20. Mr. Gaware, the learned counsel appearing for Petitioner-Vijay would contend that SDO erred in exercising jurisdiction over Tehsildar's order dated 28 November 2017 which was passed by Tehsildar as Collector's nominee while executing preliminary decree dated 31 July 1997. Accordingly, the Appeal against Tehsildar's decision would only lie before the Collector and not before the SDO. In support of his contention he would rely upon judgment of this Court in *Chandmal Dongarmal Shelot and another vs. Shantilal Valchand Shelot and others*, AIR 2003 Bom. 445.

21. Mr. Gaware would then submit that once Tehsildar, as Collector's nominee, passed an order in furtherance of execution of a preliminary decree, any person aggrieved by said decision can approach the executing Court by raising objection under provisions of Section 47. That it is not open for such an aggrieved person to challenge Tehsildar's decision before higher revenue official, such as Additional Collector, Additional Divisional Commissioner or Minister. That the decree is only a preliminary decree, which has yet not attained finality and therefore Civil Court / Executing Court is still available for any aggrieved party to seek a declaration contrary to the Tehsildar's order. That the proceedings continue to remain pending before Civil Court till trial court draws final decree. Mr. Gaware would therefore contend that the only remedy which City Corporation Ltd. could have exercised in respect of Tehsildar's order dated 28 November 2017 was to raise an objection / obstruction before

executing Court under Section 47. In support his contention Mr. Gaware would rely on following judgments.

- 1) *Phoolchand and another Vs. Gopal Lal*, (1967) 3 SCR 153.
- 2) *Shub Karan Bubna alias Shub Karan Prasad Bubna Vs. Sita Saran Bubna & Ors*, (2009) 9 SCC 689.
- 3) *Jini Dhanrajgir and Another Vs. Shibu Mathew and another*, 2023 SCC OnLine SC 643.
- 4) *Khemchand Shankar Choudhari and another Vs. Vishnu Hari Patil and others*, (1983) 1 SCC 18.

22. Mr. Gaware would further contend that City Corporation's alleged acquisition or possession of the land in question would not entitle them to claim a title to the property which must be independently established from Civil Court / Executing Court. That purchaser of a co-parcener's undivided interest in joint family property is not entitled to possess what he has purchased. He can, at the highest, seek partition of the property and allotment of his share. That following this principle it was necessary for City Corporation Ltd. to file proceedings before Civil Court for allotment of share in the property rather than adopting non-maintainable remedies before revenue officials in respect of order passed by Tehsildar towards execution of preliminary decree. In support of this contention, he would rely upon judgment of the Apex Court in *Gajara*

Vishnu Gosavi Vs. Prakash Nanasaheb Kamble and others, (2009) 10 SCC 654.

23. Mr. Godbole, the learned senior advocate would appear on behalf of Respondent No.1-City Corporation Ltd. He would firstly question the nature of decree dated 31 July 1997 and would describe it as a final decree *qua* the relief for partition. He would submit that two suits were filed viz. for partition and for accounts and that a preliminary decree has been passed in R.C.S. No.943 of 1987 for accounts, the decree passed in R.C.S. No.1141 of 1987 for partition is, in that sense, a final decree. He would therefore submit that since a final decree has been passed in suit for partition, there is no question of that Court or the executing authority to determine the contest between Vijay and Deepak with respect to their entitlement to land allotted to Anjanabai's share.

24. Mr. Godbole would further submit that in respect of properties assessed to payment of revenue, there can be only one decree and the matter cannot come back to the Civil Court at all. He would submit that this view has been taken by Single Judge of this Court in ***Concord Co-operative Housing Society and others vs. Amedmal Bhatewada (deceased) Chandrakala Shantilal Lunawat and ors***, 2023 SCC OnLine 902. He further clarified that the challenge to the said judgment is pending before the Apex Court. He would submit that the said conclusion is recorded by this Court relying on judgment of full bench of this Court in ***Ramabai Bhratar Govind Hage Vs. Anant Daji***

Hage 1944, SCC OnLine Bom 51. He would therefore contest the submission of Mr. Gaware that an application can only be moved before the executing Court by any party claiming Anjanabai's estate.

25. Mr. Godbole would further submit that there are three substantial proceedings pending before Civil Court, in which the Courts would determine who exactly would succeed to Anjanabai's estate. The the Minister has therefore rightly held that civil disputes amongst parties are *sub judice* before Civil Court and therefore Collector or his nominee being Tehsildar, could not have decided any issue with regard to dispute between two brothers / their successors in title with regard to Anjanabai's estate. He would therefore submit that dispute is required to be left to determination by Civil Court, before whom aforesaid three proceedings are pending. That the impugned order of the Minister also directs so, and therefore this Court would be loathe in exercising jurisdiction under Article 227 of the Constitution of India in interfering the with his decision. He would pray for dismissal of Petition.

26. I have also heard Mr. Rokde, the learned counsel appearing for Respondent No.2-Deepak.

27. Having recorded detailed narration of facts as well as submissions of the learned counsels for rival parties, the issue which arises for determination in the present petition is about the exact forum where the contest between two brothers relating to entitlement of estate of Anjanabai can be determined – whether it can be before the Revenue

Authorities, to whom precept has been sent for execution of preliminary decree for partition or whether it can be the Court which passed preliminary decree or the one of the courts where above proceedings are pending?

28. Section 54 of the Code provides that partition of the estate or separation of shares shall be made by Collector or an officer deputed by Collector. Section 54 reads thus-

“54 Partition of estate or separation of share – Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate the partition of the estate or the separation of the share shall be made by the Collector or any with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.”

29. Thus, under Section 54 of the Code, Collector or his nominee, which in the present case is the Tehsildar, can carve out shares of decree holders as determined by the Court in preliminary decree. If the decree holder is alive and there is no dispute between legal heirs or successors in title, the Collector's job is to merely divide the property in accordance with shares declared by the Court in preliminary decree and handover separate portions of land to each decree holder. The problem however occurs when there is a dispute between decree holder's legal heirs about their right to succeed to his/her estate or when the dispute is between one legal heir of decree holder and a successor-in-title claiming

through another legal heir. Present case involves second type of dispute where Anjanabai's grandson Vijay and City Corporation Ltd., which has purchased land through her another grandson Deepak, are fighting over the share allotted to Anjanabai in the preliminary decree.

30. The precept in the present case was sent to Collector by Civil Court by its order dated 27 January 2016. Collector deputed Tehsildar to effect partition under Section 54 of the Code. The Tehsildar had apparently the following parties before him:

1. Anjanabai through a) Deepak and b) Vijay
2. Shantabai through Uday Ghodke Plaintiffs

Vs.

Yashwant Lonkar through his legal heirs ... Defendants

There was no opposition on the part of legal heirs of Defendant Yashwant Lonkar before the Tehsildar. His job was to carve out 3/5th share of Anjanabai and Shantabai. He accordingly allotted area adm. 58.08 R each in Gat No.31/2/8 and area adm. 92.4 R each in Gat No.26/8C/9/10 in favour of Anjanabai and Shantabai each. It appears that only Petitioner-Vijay was present before Tehsildar and represented in his capacity as Anjanabai's legal heir. Tehsildar was not aware about the fact that the Deepak was also claiming entitlement to land coming to Anjanabai's share or that Deepak had sold her share to City Corporation Ltd. Believing Vijay to be the sole successor of Anjanabai's estate,

Tehsildar proceeded to direct City Survey Officer to carve out Anjanabai's share in both Gat numbers and handover possession thereof to Vijay alone. By the time order dated 28 November 2017 was passed, City Corporation Ltd. had already secured possession of the land in question from Deepak and had mutated their name to 7/12 extract by virtue of mutation entry No.12367. This is how City Corporation Ltd. was claiming both title and possession in respect of land in question in both Gat numbers by the time Tehsildar passed order dated 28 November 2017.

31) City Corporation Ltd. has adopted the route of challenging Tehsildar's order dated 28 November 2017 by filing R.T.S. Appeal before SDO, before whom it succeeded in setting aside Tehsildar's order. City Corporation also filed independent Suit bearing R.C.S. No.1275 of 2017, both against Vijay and Deepak, to claim rights in respect of land in question. It is Mr. Gaware's contention that Tehsildar's order dated 28 November 2017 was not susceptible to challenge before SDO as he was merely executing a preliminary decree as Collector's nominee. That therefore City Corporation Ltd. ought to have gone back to the executing Court to record his objections to the execution proceedings. Mr. Godbole on the other hand, contends that since R.C.S. No. 1275 of 2017 as well as Civil Miscellaneous Application No.8 of 2021 questioning Vijay's right to succeed to Anjanabai's estate based on Will dated 17 February 2005 are pending, it was not at all necessary for City Corporation Ltd. to move the executing Court as suggested by Mr. Gaware.

32. The Apex Court judgment in *Phoolchand* (supra) throws light on the course of action which can be adopted where there is contest between two legal heirs of a deceased decree holder. In case before the Supreme Court, appellant Phoolchand had filed a Civil Suit in 1942 for partition of his 1/5th share and a preliminary decree for partition was drawn on 01 August 1942. Before drawl of final decree, dispute arose between legal heirs about the share of a decree holder, who died after passing preliminary decree. One of the legal heirs relied on Will executed by Sohan Lal, which was disputed by Phoolchand, who staked claim to Sohan Lal's share. Phoolchand also claimed to have purchased share of another decree holder -Gulab Bai- based on registered sale deed executed in his favour. His brother, Gopal Lal however, contended that Gulab Bai could not have sold any share to Phoolchand. The dispute was brought to the Civil Court, which proceed to decide the entitlement of Phoolchand. It is in this factual background that the issue was raised before the Apex Court as to whether it was open for the Civil Court to entertain any dispute between Phoolchand and Gopal Lal and to vary the shares indicated in the preliminary decree, as there cannot be two preliminary decrees. The Apex Court recorded contentions on this issue in paragraph No.6 of the judgment as under-

“6. The next contention is that there cannot be two preliminary decrees and therefore when the trial court varied the shares as indicated in the preliminary decree of August 1, 1942 there was no fresh preliminary decree passed by the trial court. It is not disputed that in a partition suit the court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed if some

member of the family to whom an allotment was made in the preliminary decree (dies thereafter (see *Parshuram v. Hiraba*). So the trial court was justified in amending the shares on the deaths of Sohan Lal and Smt Gulab Bai. The only question then is whether this amendment amounted to fresh decree, The Allahabad High Court in *Bharat Indo v. Yakub Hassan* the Oudh Chief Court in *Kedernath v. Pattu La* and the Punjab High Court in *Joti Parshad v. Ganeshi Lal* seem to take the view that there can be only one preliminary decree and one final decree thereafter. The Madras, Bombay and Calcutta High Courts seem to take the view that there can be more than one preliminary decree: (see *Kasi v. V. Ramanathan Chettiar*, *Raja Peary Mohan v. Manohar*, and *Parshuram v. Hiraba*)”

33. The Apex Court thereafter proceeded to decide the contentions in paragraph No.7 as under.

“7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of (more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the

present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible and obviously this is so because the High Courts have differed on the question we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.”

34. Thus, the ratio of the judgment of the Apex Court in *Phoolchand* is that there is no restriction in the Code against passing of a second preliminary decree. That it is open for the Civil Court to draw up

a fresh preliminary decree when decree holders die after drawl of preliminary decree and there are disputes between the legal heirs about entitlement to distributed shares. In such circumstances, the Apex Court held that the Trial Court, which drew the preliminary decree, is vested with jurisdiction to decide disputes between surviving parties and pass a second preliminary decree.

35. Thus, based on the ratio laid down by the Apex Court in *Phoolchand*, in every dispute arising between heirs / successors-in-title of a deceased decree holder in a suit for partition, it is open for the Court which passed a preliminary decree to pass second preliminary decree and determine the shares of such contesting legal heirs / successor-in-title. Applying the ratio of the judgment in *Phoolchand*, the parties need to approach Civil Court for decision of issue as to who amongst the two brothers is entitled to succeed to the estate of Anjanabai. Vijay claims entitlement to Anjanabai's share on the strength of Will dated 07 February 2005. City Corporation Ltd. on the other hand is a successor-in-title through Deepak, who claims entitlement to Anjanabai's share in pursuance of Will dated 22 December 2004.

36. In my view therefore the Collector or his nominee, being Tehsildar, cannot decide the contesting claims between Vijay or Deepak or City Corporation and the issue can only be decided by Civil Court, which passed the decree in question.

37. Mr. Godbole has also raised an issue that in respect of partition of a property subject to payment of revenue to the Government, there cannot more than one decree. This submission is referable to decision of this Court in *Concord Co-operative Housing Society* (supra). However in that case, there was no issue of a contest between legal heirs / successors-in-title to estate of a deceased decree holder. On the contrary in *Phoolchand*, there was specific dispute between legal heirs / successor-in-title of decree holders in a partition suit. Therefore, the position in the present case would be covered by the dictum of the Apex Court in *Phoolchand* where the Civil Court would be entitled to pass another preliminary decree by deciding who is entitled to succeed to Anjanabai's share.

38. The next issue is the nature of proceedings that can be adopted for determining rights of contesting parties to succeed to Anjanabai's estate. Mr. Gaware would suggest that an application under Section 47 needs to be filed before the Executing Court for such determination. Mr. Godbole on the other hand submits that since substantial proceedings (Suit and Civil Miscellaneous Application) are already pending before Courts, there is no need to file any independent proceedings. However as observed above, three sets of proceedings (two Civil Suits and one Probate Application) are already pending between the parties where the question that needs to be determined is entitlement of Vijay, Deepak and City Corporation Ltd. to land allotted to Anjanabai's share in partition.

39. Though Mr. Gaware and Mr. Godbole made exhaustive submissions in support of their respective contentions on various issues, I find some degree of agreement in their submissions to the proposition that it is ultimately the Civil Court which can decide the issue of entitlement of Vijay or Deepak or City Corporation Ltd. to the share of Anjanabai. It is therefore not necessary to discuss applicability of other judgments sought to be relied upon by Mr. Gaware. Such an agreement prevailing between the learned counsels would contain an implied acceptance to the position that the Collector or his nominee cannot decide the issue of entitlements of heirs/successor-in-title to the share of a deceased decree holder. Therefore, the entire line of litigation that has taken place between the parties before Revenue Authorities till the Hon'ble Minister is futile for the purpose of deciding the nature of contest between the parties. In that sense, Minister's finding that the rights need to be established before a Civil Court, cannot be faulted.

40. In view of the consensus prevailing between the parties that Civil Court alone can decide the issue with regard to entitlement of Vijay, Deepak and City Corporation Ltd. in respect of Anjanabai's share to property, the next issue is about the exact directions which can be issued in the present petition. As observed above, three sets of proceedings are already pending before different Civil Courts. Special Civil Suit No.1669 of 2013 filed by Deepak against City Corporation Ltd. is pending before Civil Judge Senior Division, Pune. Regular Civil Suit No.1275 of 2017 filed by City Corporation Ltd. against Vijay and

Deepak is pending before Civil Judge Junior Division, Pune and Civil Miscellaneous Application 8 of 2021 seeking revocation of probate issued in favour of Vijay relating to Anjanabai's alleged Will dated 17 February 2005 is pending before the Civil Judge Senior Division, Shrirampur, District Ahemadnagar. In R.C.S. No.1275 of 2017 and Civil Miscellaneous Application No.8 of 2021 the issue is same viz. whether the Will dated 17 March 2005 executed in favour of Vijay is valid. Therefore, both the R.C.S. No.1275 of 2017 and Civil Miscellaneous Application No.8 of 2021 need to be decided by same Court, with a view to avoid passing of conflicting decrees. So far as the Deepak's suit bearing Special Civil Suit No.1669 of 2013 is concerned, Vijay is not a party to the same. However, said suit also needs to be decided by the same Court as City Corporations entitlement to succeed Anjanabai's share would depend on its success in all three proceedings. After succeeding in RCS No.1275 of 2017 and CMA No.8 of 2021, the City Corporation will have to get the Deepak's Spl.C.S. No.1669 of 2013 dismissed. If City Corporation Ltd. succeeds in all three proceedings, then only it will be able to claim title and possession to the land in question. If on the other hand Vijay succeeds in R.C.S. No.1275 of 2017 and Civil M.A. No.8 of 2021, he will be declared owner of the land in question and the Deepak's suit (Spl.C.S. No.1669 of 2013) may become infructuous. Third eventuality is where City Corporation Ltd. succeeds in R.C.S. No.1275 of 2017 and Civil M.A. No.8 of 2021, but Deepak succeeds in Spl.C.S. No.1669 of 2013 in which case, Deepak would ultimately become owner

of the land in question. This is a reason why all three proceedings need to be tried and decided by same Court.

41. I accordingly proceed to pass following order:

- (i) Order dated 17 March 2021 passed by the Minister-Revenue is upheld.
- (ii) The issue of entitlement of Petitioner, Respondent No. 1 and Respondent No. 2 to land allotted to the share of Late Anjanabai Dinkar Dhamdhere shall be decided in Regular Civil Suit No.1275 of 2017, Civil Miscellaneous Application 8 of 2021 and Special Civil Suit No.1669 of 2013. After decision of such entitlement, the Collector or his nominee shall carve out share of Late Anjanabai Dinkar Dhamdhere and hand over possession of the same to the person/entity held entitled to the same.
- (iii) Regular Civil Suit No.1275 of 2017 pending before Civil Judge Junior Division, Pune and Civil Miscellaneous Application 8 of 2021 pending before Civil Judge Senior Division, Shrirampur, District Ahmednagar stand transferred to the Court of Civil Judge Senior Division, Pune taking up Special Civil Suit No.1669 of 2013. All three proceedings shall be decided by the same Court together expeditiously.

Registry to bring this Order to the notice of Principal District Judges at Pune and Ahmednagar forthwith.

- (iv) While deciding the proceedings before it, the Court of Civil Judge Senior Division, Pune shall not be influenced by any of the observations made in this judgment. All contentions of the parties are left open.
- (v) With above directions, the Petition is disposed of. There shall be no orders as to costs.

SANDEEP V. MARNE, J.

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