

Nikita

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

WRIT PETITION NO.4421 OF 2003

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Gangubai Laxman Bankar and Ors. ... Petitioners

V/s.

Ratan Laxman Bankar and Ors. ... Respondents

Mr. R.N. Gite for the petitioner.

Mr. P.N. Joshi, a/w Mr. Nikhil Pujari for Respondent
Nos. 1 to 5.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 25, 2023

PC.:

1. By this petition, the petitioners-judgment debtors is challenging order dated 16th February 1998 passed by Civil Judge Junior Division, Pimpalgaon rejecting application to dismiss execution petition is not maintainable on the ground that the decree sought to be executed in execution is preliminary decree in a suit for partition. According to the petitioner, unless there is final decree in a suit for partition, the execution petition for executing preliminary decree is not maintainable.

2. The Trial Court rejected the objection. The petitioners challenged the order in this Court. The petition is filed in the year 2003. The petition is pending for last 20 years because of rule is

issued.

3. According to the petitioners, legal representatives of respondents need to be brought on record as some respondents have died during pendency of the petition. However, in my opinion is not necessary to consider the applications as this Court is not passing order against the interest of deceased respondents.

4. The contention on behalf of the petitioners is that even in respect of partition of agricultural properties, unless there is final decree, the execution petition is not maintainable.

5. It is well settled that an application filed under Section 54 of Code of Civil Procedure, 1908 is essentially an application to sent precept to revenue authorities. Such an application is loosely termed of execution petition. However it is not an execution petition. It is also well settled that an order of sending precepts under Section 54 of Code of Civil Procedure, 1908 is ministerial order and not judicial order.

6. The Judgment of Apex Court in the case of **Bhikoba Deora Gaikwad and Ors. Vs. Hirabai Marutirao Ghorgare and Ors.** reported in (2008) 8 SCC 198 is instructive on the point. In the facts of the case, respondent filed a suit for partition claiming 1/3rd share in house and agricultural properties. The Court passed decree directing handing over of possession of house property and agricultural land. The application was filed under Section 54 of Code of Civil Procedure, 1908 only in relation to agricultural land. The judgment debtor objected to the application on the ground that such execution is barred by limitation. The objection was

rejected by the Executing Court and the High Court. The appellant before the Supreme Court submitted that decree in question was not preliminary decree but in effect, it was a final decree and, therefore, the nature of an application needs to be termed as execution petition. In any event it was submitted that the execution petition having been filed after 17 years, was barred by Article 136 and 137 of Limitation Act, 1963.

7. Repelling such contentions raised on behalf of the judgment debtor, the Apex Court held that the decree in question was a preliminary decree. Since, the decree was in respect of agricultural land, the decree holder was entitled to file application under Section 54 of Code of Civil Procedure 1908 as per Section 54 of Code of Civil Procedure, 1908 read with Order 20 Rule 18(a), the decree holder needs to send decree to Collector for carrying out execution. Such application cannot be termed as execution application. It is held that on conjoint reading of Section 54 of Code of Civil Procedure, 1908 read with Order 26 Rule 13 and Section 21, read with Order 21, it confers on the revenue authorities power to execute such decree. The State of Maharashtra has practice to get properties partitioned by District Collector in relation to agricultural land. It is held that the Court while passing order under Section 54 of Code of Civil Procedure, 1908 is performing Ministerial functions and such functions cannot be termed as execution proceedings.

8. In my opinion, no fault can be found with the rejection of application by the Civil Court holding that while sending preliminary decree in relation to agricultural properties, the Court

exercising power under Section 54 of Code of Civil Procedure, 1908 is exercising ministerial functions and, therefore, nature of decree as to whether it is preliminary decree or final decree, loses its significance qua execution on decree in relation to agricultural properties. Therefore in my opinion, the impugned order does not suffer from any legal infirmity.

9. According to learned advocate for the petitioner, the decree contains a clause for sending decree for execution under Section 54 of Code of Civil Procedure, 1908. Therefore, according to him the execution the petition is not maintainable. For the reasons stated by the Apex Court in the case of **Bhikoba Deora Gaikwad** (supra) that the name of proceedings as execution petition is mis-normer. The application is essentially under Section 54 of Code of Civil Procedure, 1908 for sending it to the revenue authorities and such application cannot be termed as execution petition. It will not confer any right on the judgment debtor to defeat right of decree holder to get application under Section 54 of CPC.

10. Considering the petition pending from 20 years, Collector is directed to hand over possession to the decree holder within four weeks from today.

11. The writ petition is, therefore dismissed. No costs.

(AMIT BORKAR, J.)