

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.4992 OF 2022

(BANDU BHOJRAJ @ BHOJYA BANGDE..VS.. SMT. SHANTABAI PARASRAM PISE THR. LRS.
KAMLAKAR PISE & 31 OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri R.L.Khapre, Sr. Adv. a/b. Shri M.R.Joharapurkar, Advocate for Petitioner.
Shri A.S.Kulkarni, Advocate for Resp. Nos. 1 to 8, 10, 12, 14 to 21.
Shri A.J.Thakkar & Shri S.M.Mate, Advs. for Respondent Nos.4, 7, 30 to 32.
Shri N.S.Deshpande, Advocate for Respondent Nos. 24, 26 & 28.

CORAM : ANIL S. KILOR, J.

DATED : JUNE 21, 2023.

1. Heard.
2. The Third Joint Civil Judge Junior Division, Nagpur in Final Decree Proceedings, passed the order dated 08/08/2022, rejecting the application moved by the petitioner for modification of the original decree in view of the change in the provisions of the Hindu Succession Act, is under challenge in this writ petition.
3. The learned Court below, while rejecting the application Exh.87 has recorded following findings :

“... Considering the law laid down by the Hon’ble Apex Court and Hon’ble Bombay High Court in above cited cases and facts of the present case in hand. The decree passed by trial Court has been modified by the first Appellate Court by allowing cross objection in R.C.A. no. 461/2010 and Hon’ble High Court confirmed the decree passed by first Appellate Court in Second

Appeal No. 449/2014 by considering the all points raised by respective parties including point of shares of respective parties and inspite of filing writ petition by the judgment-debtors before the Hon'ble High Court in execution proceeding, the Hon'ble High Court in Writ petition No. 1680/2019 has further confirmed the finality of decree confirmed up to the High Court in Second Appeal. This Court being executing Court it is having very limited powers only to execute the decree as it is and it cannot go beyond and behind the decree. Therefore, the ratio laid down in above cited cases and facts of present case in hand is distinguishable with each other. Therefore, the application filed by the decree-holder by modifying the shares is liable to be rejected. ..."

4. From the above referred observations, it is evident that the learned lower Court has observed that the said Court being the executing Court it is having very limited powers to execute the decree as it is and it cannot go beyond and behind the decree and accordingly the application was rejected.

5. Since the suit was for partition, the decree passed was a preliminary decree and yet the final decree has not been passed.

6. The above referred aspect has not been considered by the Court below, whereas in the case of *Vineeta Sharma ..vs.. Rakesh Sharma*, reported in (2020)

9 SCC 1 the Hon'ble Supreme Court of India has held thus:

“137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.”

7. Thus, it is evident that the Hon'ble Supreme Court of India has categorically held that where the preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

8. Thus, it can be said that the Court before which the proceedings is pending for final decree can entertain the application moved by the petitioner for modification of the preliminary decree, in light of the judgment of the Honb'le Supreme Court of India in the case of *Vineeta Sharma* (supra).

9. In the circumstances, I am of the opinion that the matter needs to be remanded back for decision afresh including point of jurisdiction and powers as regards modification of the preliminary decree. Hence, I pass the following order:

- i) The writ petition is partly allowed.
- ii) The impugned order dated 08/08/2022, passed by 3rd Joint Civil Judge Junior Division, Nagpur is hereby quashed and set aside.
- iii) The matter is remanded back to 3rd Joint Civil Judge Junior Division, Nagpur for deciding it afresh on its own merits, in accordance with law after hearing both the parties.
- iv) The parties shall appear before the 3rd Joint Civil Judge Junior Division, Nagpur on 05/07/2023.
- v) All points are kept open.

The writ petition is **disposed of** accordingly.
No order as to costs.

JUDGE

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