



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11480 OF 2023

1. Mahadeo s/o Krishna Thavare
 2. Pramilabai @ Pamabai W/o. Krishna Thavare
- ... PETITIONERS
(Orig. Judgment debtors)

Versus

1. Kasudabai w/o Sidheshwar Paduule
Died Through LR.S
 - 1-A. Sakharbai wd/o Dadasaheb Bandgar
 - 1-B. Sheshrao s/o Sidheshwar Padule
 - 1-C. Saraswati @ Sarla wd/o Uttareshwear Bere
 - 1-D. Machindra s/o Sidheshwar Padule
 - 1-E. Gorakh s/o Sidheshwar Padule
 - 1-F. Sidheshwar s/o Sambhaji Padule
 2. Gayabai w/o Aba Devkar
Died Through LR.S
 - 2-A. Sarubai w/o Harischandra Thavare
 - 2-B. Tulshidas S/O Aba Devkar
 - 2-C. Kamlakar s/o Aba Devkar
 3. Prayagabai wd/o Bhagwan Kolekar
 4. Indrabai Krishna Thavare
Died Through LR.S respondent nos. 1 to 3
 5. Bharat Krishna Thavare
- ... RESPONDENTS
(Orig. Decree Holders)

Mr. S. Y. Mahajan, Advocate for the petitioners
Mr. V. D. Salunke, Advocate for the respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON: 1st AUGUST, 2024

PRONOUNCED ON : 7th OCTOBER, 2024

ORDER :-

1. This writ petition takes exception in order dated 04/05/2023 passed by 3rd C.J.J.D. Paranda below Exhibit 63 in Regular Darkhast No.

08/2011 in R.C.S No. 189/1997.

2. The petitioners are judgment debtors in R. D. No. 08/2011 which came to be filed for execution of judgment and decree passed in R.C.S. No. 189/1997 for partition and separate possession of the suit properties. In the said properties respondents-plaintiffs were granted 1/15th share. It is claimed of the petitioners that during the pendency of R.C.S. No. 189/1997 Government of Maharashtra acquired portion of the suit land for Sina Kolegaon project to the extent of land admeasuring 18 H 92 R. It is claimed by the petitioners that out of the said total land, land admeasuring 4 H 72 R was owned and possessed by Indrabai and land admeasuring 14 H 20 R was owned and possessed by the petitioners. The Special Land Acquisition Officer passed award. This award was challenged before the Reference Court in LAR No. 317/2015. The said proceeding was decided on 30/11/2018. In the meantime the respondents who were owners and possession of land admeasuring 4 H 72 R land filed separate LAR for enhancement of compensation in respect of their land the said proceeding is pending.

3. After judgment and decree passed in R.C.S. No. 189/1997 on 25/02/2010, respondents filed Regular Darkhast No. 08/2011 for execution of decree. An application was filed at Exhibit 20 for sending the decree to the Collector for execution. The execution Court by passing

order issued precept to the Collector for execution of the decree. Respondents thereafter filed an application below Exhibit 46 for amendment in the application and it is submitted that inadvertently the names of the decree holder no.1-A to 1-E it is mentioned as judgment debtor and decree holder no.2-A to 2-C are mentioned as J.D. 2-A to 2-C. During the pendency of darkhast proceeding JD no.1 Indrabai died. Decree holder nos. 1 to 3 are the only heirs and amendment was sought. It was claimed by the petitioners by filing say contending that the applicants are not only amending the darkhast but they are changing scope of the darkhast and seeking modification of decree is not permissible in law. Execution Court, however, allowed the said application Exhibit 46 by order dated 28/01/2020. (This order is not challenged).

4. On the same day respondents filed another application vide Exhibit 48 contending that they have 1/15th share in the suit properties. It is alleged by the respondents that the petitioners in collusion with the land acquisition officer has withdrawn entire amount of compensation wherein they have share. In reply to application Exhibit 48, it was a contention of the petitioners that since the precept is already sent to the Collector for execution of decree, the application is not maintainable and the court has no jurisdiction to entertain the application. It is submitted that the award passed by the land acquisition authority is as per the provisions of the Land Acquisition Act and Civil Court has no jurisdiction

to modify the award. Application Exhibits 46 and 48 were allowed with the directions to the petitioners to deposit the amount received in LAR No. 317/2015. Petitioners being aggrieved by the said order dated 28/01/2020 passed below Exhibit 48 of directing them to deposit the amount filed Writ Petition bearing No. 5413/2021. This Court allowed the petition partly with the observation that execution Court cannot travel beyond the decree. It is directed by this Court that the petitioners would retain the amount of compensation subject to their furnishing security before the Execution Court to its satisfaction and undertaking that they would, in case, it is so directed in future bring back money in terms of the report of the Collector. This Court in the said writ petition passed further order has observed that the Collector to look into the matter with regard to the reworking of the shares by Execution Court.

5. It is further case of the petitioners that thereafter another application Exhibit 63 was filed by respondents to permit them to amend the application for execution of decree. It is contended that the decree holder nos.1 to 3 are having 7/10th share collectively and 7/13th share each and J.D. no.2 is having 1/10th share in J.D. 3 no. is having 1/5th share in the suit property. It is the case of the petitioners before the Execution Court that the application is not maintainable, however, the Execution Court passed impugned order and hence, this petition. The petitioners thus challenged impugned order, *inter alia*, by raising issues

such as;

(i) Civil Judge, Junior Division, Paranda while passing the order dated 04/05/2023 failed to consider that the Executing Court cannot go behind the decree and could not have decided rights of parties.

(ii) Execution Court failed to consider that the Court passing the decree has not granted any share to defendant no.1 Indrabai as such her share cannot be ascertained by execution Court.

6. Learned counsel for the petitioners submits that since in R.C.S. No. 189/1997 while passing judgment and decree no share was given to the defendant and the shares in the suit properties were allotted only to the plaintiff nos.1 to 3, the death of defendant i.e. Indrabai subsequent to the passing of judgment and decree is in consequential. It is his submission that the execution Court cannot go behind the decree nor would effect modification in the decree. To support his submission he has placed reliance on the judgment of the Hon'ble Supreme Court in case ***Brakewel Automotive Components (India) Pvt. Ltd. Versus P.R. Selvan Alagappan, 2017 Legal Eagle (SC) 188***. On these amongst other submissions he sought interference in impugned order.

7. On the other hand the learned counsel for the respondents supported the impugned order on the ground that during the pendency of the suit amendment has been effected to Section 6 of the Hindu

Succession Act whereby a daughter has become coparcener. It is his submission that in view of the judgment in case of *Ganduri Koteshwaramma and Another Versus Chakiri Yanadi and Another, 2012 AIR (SC) 169* it was open for the Court to modify the shares of the parties since they arose out of amended provisions of 2005.

8. Issue before this court is as to whether it was open for the Court below to pass impugned order permitting amendment to the execution application whereby the claim was made on the basis of right of Indrabai to get share in the suit properties. In order to appreciate his submissions of rival side it is relevant to take into consideration provisions of Section 38 of the Code of Civil Procedure which reads thus:

“38. Court by which decree may be executed .-
A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.”

9. The afore stated provision clearly indicates that it is open for the trial Court to execute decree itself or to sent the decree for its execution to the execution Court. Herein this case the judgment and decree in R.C.S. No. 189/1997 has been passed by CJJD, Paranda. The execution also has been done by the same Court.

10. Section 47 of the Code of Civil Procedure provides as under:

“47. Questions to be determined by the Court executing decree .-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.[* * *]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. [Explanation I .-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II .-

(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

11. According to the said provision all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution discharge of satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. At this stage it would be relevant to take into consideration the judgment of the Hon'ble Supreme Court in case of ***Brakewel Automotive Components (India) Pvt. Ltd.*** (supra). In paragraph No. 19 of the said judgment, it is held as follows:-

"19. It is no longer res integra that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus inexecutable. An erroneous decree cannot

be equaled with one which is a nullity. There are no intervening developments as well as to render the decree inexecutable.”

12. Thus, it clear that the Execution Court can not travel behind the decree nor sit in appeal over the same. However, in the instant case, the trial Court is the executing Court.

13. The suit is filed in year 1997 and the same is decreed in the year 2010. No doubt there is no challenge to the said decree by any party. The question arises as to the effect of amendment to Section 6 of the Act, it would be relevant to take note of said provision, which reads thus;

“6. Devolution of interest in coparcenary property. —

(1)On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a)by birth become a coparcener in her own right in the same manner as the son;

(b)have the same rights in the coparcenary property as she would have had if she had been a son;

(c)be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) -----

(3) -----

(4)-----

(5) Nothing contained in this section shall apply to a

partition, which has been effected before the 20th day of December, 2004.Explanation. —For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.”

14. The said provision clearly indicates that the only exception to the applicability of Section is in case of a partition which is effected 20th December, 2004 or the partition is effected by decree of a Court. This has been interpreted as the decree means final decree of the Court. It is thus clear that it is open for the Court to modify the decree to the extent of calculating shares of the respective parties till final decree is drawn.

15. At this stage reference can be made to the judgment of Hon’ble Supreme Court in case of ***Ganduri Koteshwaramma*** (supra) wherein it is held in paragraph 17 as under:

17. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation. We are fortified in our view by a 3-Judge Bench decision of this Court in the case of Phoolchand and Anr. v. Gopal Lal AIR 1967 SC 1470 where in this Court stated as follows:

"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.... 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;.... 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... 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....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...."

(Emphasis supplied)

16. The Hon'ble Supreme Court in paragraph no.18 has referred to the judgment in case of *S. Sai Reddy v. S. Narayana Reddy and Ors. (1991) 3 SCC 647* wherein the question occurred before the Supreme Court that where during the pendency of the proceeding in the suit for partition before the trial Court or prior to passing of final decree, the act was amended and as a result of which unmarried daughter became entitled to the share in the joint family property. The unmarried daughter made an application before the trial Court claiming their share in the

property after the amendment. The trial Court rejected the said application on the ground that the preliminary decree had already been passed and specific shares of the parties have been declared and thus it was not open for the daughters to claim share in the property by virtue of state amendment. The unmarried daughters preferred revision against the said order and High Court set aside the order and declared that in view of the Section 29(A) unmarried daughters were entitled to the share in the joint family property. A direction was given to the trial Court to determine the shares of unmarried daughters accordingly. The Hon'ble Supreme Court has observed :

"...A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which Clause (ii) of Section 29A of the Act became applicable. This intervening event which gave shares to Respondents 2 to 5 had the effect of vary *Ganduri Koteshwaramma* (supra)ing shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of

benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.”

. The above judgments therefore clearly lay down position of law in respect of the applicability of amended Section 6 of Hindu Succession Act. A daughter is therefore to be considered as a coparcener and would get equal right to that of a son, as on the date of said amendment. The only exception to the applicability of this provision to a particular case is that there is registered deed of partition before 20th December, 2004 or there is a partition by decree of the Court. The Hon’ble Supreme Court has held in no uncertain terms that the partition by decree is actual partition by metes and bounds and final decree is drawn.

17. Reverting back to the facts of the present case, admittedly, no final decree has been drawn in this case. What has been done by the trial Court is the precept has been issued to the Collector for effecting the actual partition and it is only after actual partition of suit properties by metes and bound, a final decree can be passed by a Court. In such circumstances, since the execution Court is trial Court itself, this court finds no reason to hold that it was beyond the jurisdiction of the trial Court to modify the decree to the extent of calculating shares of the parties in view of the amended provisions of Section 6 of the Act. In case of *Ganduri Koteshwaramma* (supra) Hon'ble Supreme Court has held that, after passing of preliminary decree, suit continues until final decree is passed if in interregnum, i.e. after passing of preliminary decree and final decree is passed, the events and supervening circumstances occurs, necessitating change in shares there is no impediment for the Court to amend preliminary decree or to pass another preliminary decree, redetermining rights and interest of parties having regard to change in circumstance.

18. It is pertinent to note that there is no dispute between the parties with regard to the applicability of the amended provisions of Section 6 to the instant case. Properties in question are ancestral properties. The subsequent event has necessitated change in the decree and it was lawful for trial Court to modify preliminary decree. Even

assuming that technically an application was required to be filed in suit, in view of the fact that since, the trial Court only is executing the said decree, in considered view of this Court it would be unnecessary to call upon the respondents to file an application in the original suit for modification of the decree and to seek same order. In the peculiar facts and circumstances of the case, impugned order is not perverse in order to call any interference therein, in exercise of writ jurisdiction. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

LATER ON

19. After pronouncement of the order, learned counsel for the petitioner seeks extension of interim relief granted by this Court for a period of six weeks in order to challenge the order passed by this Court before the Hon'ble Supreme Court.

20. Learned counsel for the respondent opposes the said request.

21. Order granting stay to the order impugned in this petition, is in force for a period more than a year now. This Court finds no reason or justification not to accept the request of the petitioner. Order dated 13/09/2024 stands extended for a period of six weeks from today.

(R. M. JOSHI, J.)

ssp