



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 215 OF 2016

1. Mohit s/o Kailas Aakhade,
Age : 9 Years, Occ. Minor,
Being minor guardianship of,
Kavita W/o Kailas Aakhade,
Age : 31 Years, Occ. Agriculture,
R/o. Jalke Khurd, Tq. Newasa,
District Ahmednagar.
 - 2, Rohit s/o Santosh Aakhade,
Age : 12 Years, Age : Minor,
Under the guardianship of petitioner No.2,
Rukhminbai w/o Santosh Aakhade,
Age : 38 Years, Occ. Agriculture,
R/o. Jalke Khurd, Tq. Newasa,
Dist. Ahmednagar
- .. Applicants

VERSUS

1. Indubai w/o Tukaram Motkar,
Age : 72 Years, Occ. Agriculture,
R/o. Near Highway, Waluj,
Tq. Gangapur, Dist. Aurangabad
 2. Kaushalyabai W/o Rajaram Motkar,
Age :Major, Occ. Agriculture,
R/o. Near Petrol Pump, Padegaon,
Dist. Aurangabad.
 3. Kasamji Bhuraji Rangrej,
Died
 4. Shakil Anwar Shaikh Kasambhai,
Died through LRs
 - 4/1 Shaikh Raees Shaikh shakil,
Age : 39 Years, Occ. Labour,
R/o. Bhavani Peth, Jalgaon,
 - 4/2 Shaikh Anees Shaikh Shakil
Age: 35 Years Occ. Labour,
R/o. As above
- Deleted

- 4/3 Anjumaara w/o Vilayat Hussain,
Age : 45 Years, Occ. Household,
R/o. Master Colony, Mehrun Jalgaon,
- 4/4 Shahin Bano Shaikh Shakil @
Shahin Bano w/o Asif Khan
Age : 37 Years, Occ. Household,
R/o. Aqsa Nagar, Mehrun Jalgaon,
- 4/5 Rubina Parvin shaikh Shakil @
Rubina Parvin Chirag Rangrej
Age : 40 Years, Occ. Household,
R/o. Bhavani Peth, Jalgaon
- 4/6 Farhat Sultan Shaikh Shakil @
Farhat Sultan Firoz Khan
Age : 36 Years, Occ. Household,
R/o. As above .. Respondents
5. Abedabanu Shakil Anwar Shaikh Deleted

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Mr. Sharad V. Natu, Advocate for the Applicants.
Mr. Rahul R. Karpe, Advocate for the Respondent No.1
Respondent Nos. 2 as per order dated 14.08.3028
and Respondent No.5 are deleted as per order dated
25.01.2019

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CORAM : SANDIPKUMAR C. MORE, J.

Reserved on : 06.02.2024
Pronounced on : 24.04.2024

ORDER:-

1. The present applicants have challenged order dated 04.11.2016 passed by the learned IIIrd Civil Judge, Junior Division, Newasa (hereinafter referred to as the “learned trial Court”) below Exh. 31 in Regular Darkhast No. 25/2011 whereby their objection about the maintainability of execution

proceeding and calling back the precept sent to the concerned Collector for execution, has been rejected.

2. The present original respondent No.2 had filed suit for partition and separate possession against her mother Tulsabai and present respondent No.1 Indubai and the purchasers from them in respect of the suit property land Gut No.31. The respondent No.1 and her mother had filed written statement and thereby denied the claim of Kauslyabai. The learned trial Court vide judgment and decree dated 23.03.1994 had dismissed the suit, but the learned First Ad-hoc Additional District Judge, Shrirampur, vide judgment dated 23.03.2004, decreed the suit and determined 1/3 share of the plaintiff i.e. Kauslyabai. Kauslyabai then filed Regular Darkhast No. 11/2005 for execution but present respondent Nos. 4 and 5 made compromise with her in respect of her 1/3rd share and therefore, the said Darkhast was disposed of on 14.06.2010. Thereafter, the present applicants purchased the suit property from respondent Nos.4 and 5. However, respondent No.1 Indubai then filed execution proceeding bearing Regular Darkhast No. 25 of 2011 for effecting partition and separate possession of her 1/3rd share in the suit property wherein the learned trial Court directed the District Collector, Ahmednagar, to effect the partition according to the said decree in Regular

Civil Appeal No. 151 of 1994. The applicants as aforesaid filed application at Exh.31 for the purpose mentioned above which has been rejected and hence this application.

3. Heard rival submissions and also perused the documents on record.

4. It is significant to note that the applicants being third party have preferred application Exh.31, under Order XXI Rule 26 along with Section 151 of the Code of Civil Procedure for dismissing the execution proceeding on the ground that the earlier Regular Darkhast No. 11/2005 for execution of the same decree has been disposed of. According to them, the present decree holder i.e. Indubai should have approached the Appellate Authority prescribed under Maharashtra Land Revenue Code instead of filing the execution proceeding. According to them, they have purchased the suit property but despite that the decree holder has not made them party in the execution proceeding.

5. The learned counsel for the applicants submits that the learned trial Court has erroneously dismissed the application by ignoring the fact that Indubai cannot execute the decree. He pointed out that the learned trial Court needs to be directed to decide this aspect first. For that purpose, he relied upon the

judgment of **Mysore High Court in the case of Neelappagouda Ramangouda Patil and others Vs. Kariyappa Goud** reported in **A.I.R 1965 Mysore 46** wherein it is observed that the Civil Court is having power to recall the papers transmitted to the Collector if the papers have been wrongly transmitted or directed. It is further observed that even the Appellate Court is having power to reverse the order passed by the Civil Judge and to direct him to issue instructions, if it is found that the Collector is asked to make partition in a manner entirely at variance with the decree.

6. On the contrary, the learned counsel for the decree holder Indubai strongly opposed submissions made on behalf of the applicants. According to him, if the third party, who has subsequently acquired the suit land after passing of decree, can file independent suit and in that case bar provided under Section 47 cannot come in the way. For that purpose, he relied on the judgment of this Court reported **in the case of Prakash Nathyaba Bhosale Vs. Laxman Genaba Bhosale**, reported in **2003 (1) Bom.C.R. 218**.

7. On going through the impugned order, it is evident that the learned trial Court has observed that the applicants being third party are not entitled to file application under Order XXI

Rule 26 of the Code of Civil Procedure as well as Section 151 of the Code of Civil Procedure, since they are not Judgment Debtors. Further, the learned trial Court has also relied on the observations of the Hon'ble Apex Court in the case of ***Bikoba Deora Gaikwad and others V/s Hirabai Marutirao Ghorgare and others, 2008(8) DGLS (SC) 840*** wherein it is observed that Section 54 of C.P.C only provides for a ministerial function of a Court and it cannot be termed to be an execution proceeding. It is to be noted here that as per the observations of this Court in the case of ***Prakash Vs. Laxman*** (supra), the objection raised by the applicants can also be decided by the Revenue Officer. This Court has specifically observed in the said case that for challenging the partition effected by the Revenue Authority in pursuance of the decree passed by the Civil Court being contrary to the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 can be decided exclusively by the Competent Authority under the said Act. As such, it can be seen that the applicants can raise their objections before the Collector and in that case the Collector can seek direction from Civil Court. Therefore, the application for dismissing the execution proceeding itself filed by the present applicants at Exh.31 is not maintainable. As such, no perversity appears

in the impugned order and accordingly the present application stands dismissed.

8. After pronouncement of order, the learned counsel holding for Mr. Natu, for the applicants requested for continuation of interim relief which was in force during the pendency of this application.

9. The learned counsel for respondent No.1 admitted this position.

10. In view of the same, the said interim relief be continued till further period of four weeks.

(SANDIPKUMAR C. MORE, J.)

Y.S. Kulkarni