



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

**SECOND APPEAL NO. 162 OF 2025
WITH
CIVIL APPLICATION NO. 4580 OF 2025**

**ANITABAI BABASAHEB MAGAR AND OTHERS.
VERSUS
ASRABAI KISAN NIKAM AND OTHERS.**

...
**Mr. S.S. Bora, Advocate for appellant,
Mr. R.V. Gore, Advocate for respondent.**

CORAM :S.G. CHAPALGAONKAR, J.

DATE : 9th May, 2025.

P.C. :-

1. The appellants/original applicants impugn the judgment and decree dated 14.2.2025 passed by District Judge, Vaijapur, in RCA No. 33 of 2024, thereby upholding the judgment and order dated 3.11.2023 passed by Civil Judge (J.D.) Vaijapur, in Misc. Civil Application No. 174 of 2021, thereby, declining prayer for re-determination of shares in a partition decree passed in Regular Civil Suit No. 4 of 1975.

2. Brief facts, giving rise to present appeal, are as under :-

One Asrabai instituted RCS No. 4 of 1975 seeking a relief of declaration, partition and possession in respect of suit properties against her daughters namely, Hansabai and Zumrabai, so also, daughter in law – Gayabai. The suit came to be decreed on 30.7.1980 approving 23/32nd Share of plaintiff. Defendants/daughters Hausabai and Zumrabai were held entitled for 1/16th share, whereas, Gayabai was held entitled for

5/32nd share in the suit property.

3. Gayabai (daughter in law) unsuccessfully challenged the judgment and decree of trial court in RCA No. 297 of 1981 before the District Judge, Aurangabad. Even Second Appeal No. 115 of 1988 filed by her came to be dismissed. In pursuance to the decree in RCS No. 15 of 1975, R.D. No. 15 of 1996 was filed, wherein, precept under Section 54 of CPC has been transmitted to the Collector.

4. In the year 1995, i.e. during pendency of second appeal, Gayabai executed sale deed in favour of present Appellants/applicants. When the appellants received notice of measurement in pursuance to execution of decree, they filed Misc. Application No. 174 of 2021 before the Civil Judge (J.D.) at Vaijapur contending that original plaintiff Asrabai and one of the daughters Hausabai have been expired after passing the decree. The execution is pursued by Zumrabai i.e. another daughter of Asrabai. It is, therefore, necessary to re-determine/augment all shares and for that purpose recalling of the precept is necessary.

The executing court rejected the application. The applicants filed appeal before the learned District Judge, which also came to be dismissed. Hence, this second appeal.

5. Learned Advocate for appellants submits that the decree passed in RCS No. 4 of 1975 is subject matter of execution. The applicants are purchasers of part of suit lands under registered sale deed executed by Defendant No.1 Gayabai, who has been granted 5/32nd Share in the suit property under the decree. Lateron, original plaintiff Asrabai and defendant No.2 Hausabai expired. Therefore, it was necessary for the executing court to re-determine the shares by recalling

the precept under Section 54 of the CPC, and adjust shares in tune with the subsequent events. The appellants have stepped into the shoes of Gayabai and entitled for equitable partition and allotment of share of Gayabai. Mr. Bora, relying upon observations of the Supreme Court of India in the case of *Ganduri Koteshwaramma and others vs. Chakiri Yanadi and others reported in AIR 2012 SC 169*, submits that in a suit of partition and separate possession, court has always power to revise the preliminary decree, if the situation in changed circumstances so demand. The suit in partition continues after passing of preliminary decree and proceeding in suit gets extinguished only on passing a final decree. He would, therefore, urge that the Executing Court as well as the First Appellate Court were clearly in error in declining to consider the applicants' prayer. He would urge that it was obligatory on the part of courts to exercise jurisdiction under Order 20 Rule 18 of CPC read with Section 47 of the CPC and grant appropriate relief.

6. Per contra, Mr. Gore, learned advocate appearing for respondent No.4 – Caveator vehemently opposes the admission of appeal. He points out that the decree for partition has been passed in the year 1980, which has been confirmed upto this court when Second Appeal filed by Gayabai was dismissed on 18.4.1996. The Regular Darkhast has been disposed of on 11.11.2006 after Precept under Section 54 is sent to the Collector for execution of decree. Mr. Gore would point out that appellant/applicants are purchasers of suit property during pendency of second appeal. The transaction under sale deed is hit by Section 52 of the Transfer of Property Act. They cannot claim independent right in the suit property. Mr. Gore would further submit that all the questions raised in this appeal are elaborately considered by the Courts below. As such, no substantial question of law arise for consideration in appeal.

7. Having considered submissions it can be observed that appellants/applicants are purchasers of suit lands during pendency of second appeal. The share of Gayabai has been already determined in the suit property, under the decree passed in the year 1980, which has attained finality in the year 1996, after its confirmation in second appeal. The applicants are pendente-lite purchasers. They cannot claim any right beyond the entitlement of their vendor/judgment debtor in RCS No. 4 of 1975.

8. Admittedly, the suit was instituted by Asrabai i.e. mother in law of Gayabai/vendor of applicants. Two daughters of Asrabai, namely, Hausabai and Zukrabai were defendants in the suit alongwith Gayabai. When the suit was decreed, Gayabai was allotted 5/32nd share in the suit properties. According to applicants, Asrabai died on 19.8.1089 and Hausabai died on 10.7.2017. Therefore, death of Asrabai occurred during pendency of second appeal before this Court, whereas, death of Hausabai occurred even after disposal of execution proceeding and Precept was transmitted to Collector under Section 54 of CPC.

9. Appellants/applicants contend that augmentation of shares of parties to the suit, is necessary in view of subsequent death of Asrabai and Housabai. It can be observed that on death Asrabai and Hausabai, only Zumrabai i.e. daughter of Asrabai and sister of Hausabai would inherit their share applying Section 8 of the Hindu Succession Act. Gayabai being widow of per-deceased son of Asrabai would not be entitled to claim any right in the property left behind by Asrabai, when her daughter Zumrabai would inherit the same. Similarly, even in absence of any other legal heir, share of Hausabai would be available to

Zumrabai. In that view of the matter, appellants/applicants who are claiming through Gayabai will have claim only in the share of Gayabai, which is already determined and does not require augmentation or re-determination on death of Asrabai and Hausabai.

10. In this background, although there cannot be dispute on legal proposition that the Executing court can pass preliminary decree or reformulate the shares, in a partition decree in absence of change in entitlement of Gayabai owing to death of Asrabai and Hausabai, there is no occasion of augmentation of shares or to entertain the prayers of appellants/applicants. The executing Court as well as appellate court is, therefore, justified in rejecting their claim.

11. At this stage, it would be apposite to refer certain observations of the Supreme Court in the case of ***Khemchand Chaudhari vs. Vishnu Hari Patil and others AIR 1983 SC 124***, wherein, it is observed as under :

“The Collector who has to effect partition of an estate under Section 54 of the Civil Procedure Code has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute should he fold up his hands and return the papers to the Civil Court ? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party : the official receiver may be allotted the share of the insolvent. In the case of transferees *pendente lite* also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no *locus standi*. A transferee from a party of a property which is the subject matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so.

12. In view of aforesaid exposition of law, appellants may pursue the Collector or Authorized Officer for allotment of properties in an equitable manner to the extent of share of their vendor i.e. Gayabai. In that case Collector in his discretion may accept their request and adjust shares accordingly.

13. In the light of aforesaid discussion, no substantial question of law arises for consideration in this appeal.

14. Second appeal is dismissed with liberty in favour of applicants/applicants to pursue their remedy before the Collector. Pending civil application stands disposed of.

[S.G. CHAPALGAONKAR, J]

grt/-