

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1128 OF 2025

Mrs. Kavita Agarwal]
Age : 51 Years, Occu: House Wife]
R/at: Temporarily at: B-1102]
Sylvan Heights, Sanewadi,]
Aundh, Pune- 411007] *...Petitioner*

Versus

Mr. Sanjeev Kumar Agarwal]
Age: 57 Years, Occu. : Business]
R/at: 901 Aman Co-op HSG Society,]
Plot No. 10, 11 Bhosale Nagar,]
Pune- 411007] *...Respondent*

.....
Mr. Abhijit Sarwate a/w Ms. Hardev K. Aidhen, for the
Petitioner.

Mr. Hitesh Vyas a/w Mr. Rasik Raut, for the Respondent.
.....

CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 11th JUNE, 2025

PRONOUNCED ON : 30th JUNE, 2025

JUDGMENT :-

1. **Rule.** Rule made returnable forthwith and heard finally with the consent of the parties.

2. The Petitioner has challenged the order of rejection of his application passed by the Family Court No.5, Pune, below Exhibit 37 in Petition B. No. 35 of 2023.

3. It is the case of the Petitioner that the Petitioner and Respondent who are, *inter se*, Husband and Wife, during their matrimony, have purchased various properties. The Petitioner was compelled to leave her matrimonial house on 17.02.2021. Since then, she is residing with her brother and thereafter, in the rented premises. The property, as described in the plaint, is purchased vide 'Agreement to Sale' dated 30.12.2010, which is duly registered with the Sub-Registrar No. II, Taluka Haveli, District Pune. The entire stamp duty has been paid on the said document and possession has been handed over to the Petitioner and Respondent. The Petitioner and Respondent are joint owners of the suit premises. The suit property comprises of 4 bed rooms, 4 WCs, 1 Kitchen, 1 dry balcony, 1 pooja and

dining room, 1 balcony, 1 terrace, 1 hall and huge lobby. The suit property is a duplex, with internal staircase leading to the upper floor, which has only one entrance. The nature of the suit property is such that it cannot be demarcated/divided, so as to create two tenements. Since she has left her matrimonial home, the Petitioner is deprived of her right to enjoy matrimonial home, which, according to her, is an act of domestic violence and it amounts to harassment by the Respondent. Persistent threat is created by the Respondent to her life, privacy and dignity.

4. Presently, the matrimonial home is occupied by the Respondent along with their son and daughter-in-law. Owing to the conduct of Respondent, she is constrained to stay outside her matrimonial home. Hence, she is entitled to seek partition in the suit property. On the said premise, she has filed suit for partition of the suit property.

5. The Respondent had filed a Written Statement on 11.03.2024. According to him, the Petition filed by the Petitioner is false and frivolous, there is no dispute between

them, which cannot be resolved. But, the Petitioner out of her extreme anger issues, egoistic nature and hunger for money, has voluntarily left her matrimonial house. According to the Respondent, there is no cause of action occurred to the Petitioner to file the Petition in the Family Court.

6. So far as the property in respect of which the partition is claimed by the Petitioner, the Respondent, in his Written Statement, has admitted that, for the sake of future security, he decided to buy the flat in joint names by obtaining a loan of Rs. 1.28 Crores against the said property. He also obtained a loan of Rs. 70 lakhs from HDFC Bank Limited. The 'Agreement to Sale' was executed in the year 2010, but the final deed of conveyance is yet to be executed. The suit property cannot be partitioned as the suit property is not of absolute ownership. The suit property is not free from encumbrances since the loan obtained from the HDFC Limited, which was taken against the suit property, was transferred to his hotel located at Hinjewadi, Pune.

7. It is his contention that only out of love and affection, he has purchased the said flat in their joint names. Just because her name is mentioned in the 'Agreement to Sale' of the property, she cannot be declared as a joint owner. He alone has paid full consideration of the said flat. According to him, the suit filed by the Petitioner suffers from non-joinder of the parties, since the housing society in which the residential premises are located is not made a party Respondent.

8. The application for issuing preliminary decree was filed by the Petitioner on 20.04.2024. The application was filed relying to the averment made by the Respondent, in Para "N" on Page 17 of the Written Statement, wherein it is stated by the Respondent that, out of love and affection, he purchased the said flat in joint name with the Petitioner. According to him, there is a contradiction in the stand taken by the Petitioner on Page Nos.6 and 17. On Page No.6, there is an averment made by the Respondent that, the Petitioner cannot be a joint owner of the said flat, whereas on Page No.17, he has admitted that, the flat is in joint name with the Petitioner. Relying on the averment made on Page No.17, the Petitioner

has filed application for passing of a preliminary decree.

9. The application was opposed by the Respondent by filing 'Say' to the application. According to him, merely because property was purchased in the joint name, it does not entitle the Petitioner for half share in the property. Only after framing of issues on the basis of pleadings of parties regarding maintainability of the suit and right of ownership, etc., the Petitioner would be entitled for relief as claimed by her.

10. On the basis of the rival contentions, the application at Exhibit 37, was heard by the Judge, Family Court, Pune in P.B. No. 35 of 2023, which came to be decided vide order dated 09.12.2024. The application has been rejected by holding that, the stage of the suit is preliminary, and as yet, no evidence is recorded. After framing issues, parties will get an opportunity to lead evidence to prove the respective consideration, if any, paid by them, and thereafter, their share or title will be proved. By recording the above observations, the application was rejected vide order dated 09.12.2024. This order of rejection dated 09.12.2024 is assailed by the Petitioner.

11. It is the contention of Mr. Sarwate, learned Counsel appearing for the Petitioner that, the impugned order is erroneous on the background of fact that, an application under Order VII Rule 11 (a) & (D) r/w Section 151 of the Civil Procedure Code, 1908 (**CPC**), was filed by the Respondent for rejection of the plaint, on 12.12.2023. In the application, the categorical stand of the Respondent was that the Petitioner has herself clearly admitted that the 'Agreement to Sale' of the property is executed and final 'conveyance deed' of the property is yet not executed. In view thereof, prayer for rejection of plaint was made on the ground that if title is not perfect, suit for partition is not maintainable.

12. While passing the order on the objection raised by the Respondent, the Judge, Family Court No.5, Pune, has rejected the application on 08.02.2024, with the observation that he has gone through the copy of the Index II, filed below Exhibit 3, which shows that the Petitioner and the Respondent are joint owners of the suit property. Therefore, taking into consideration the nature of relief claimed by the Petitioner and the averments made by her in the Petition as well as

considering scope of Section 7 of the Family Court Act, 1984, cause of action has arisen to the Petitioner to file the suit for partition. With the above observations, the application is rejected on 08.02.2024 by the Judge, Family Court No.5, Pune.

While rejecting the application filed below Exhibit 37, the Judge, Family Court No.6, Pune, has taken a totally contradictory view, to his earlier view taken while rejecting the application below Exhibit 17, vide order dated 12.12.2023.

13. According to the learned Counsel for the Petitioner, the application has been rejected by the Judge, Family Court, by making observations contrary to his own findings, recorded in the order below Exhibit 17. Admittedly, while rejecting the application under Exhibit 17, it is recorded in his order that the copy of Index II filed below list Exhibit 3, itself is evident to show that the Petitioner and the Respondent are joint owners of the suit property and therefore, taking into consideration the averments made by the Petitioner, the cause of action has arisen for her to file the suit, seeking relief of

partition of the suit property, along with declaration of $\frac{1}{2}$ undivided share in the suit property. With such observations, the application has been dismissed.

14. As against that, in the impugned order it is held that, undisputably, sale deed is not yet executed and therefore, it cannot be said that property is purchased, hence, no valid and legal title is vested in the parties. Since there is no valid title acquired by the parties, the preliminary decree cannot be passed.

15. It is the contention of the Petitioner that observations made by the Judge, Family Court, are not at all tenable since, it would operate as *res judicata* in view of the earlier observations recorded in the order below Exhibit 17. Reliance is placed on the observations made by the Hon'ble Supreme Court in support of his contention that *res judicata* can apply even to different stages of the same suit. In order to lend support to his contention, Mr. Sarwate, the learned Counsel, relies on the observations made by the Hon'ble Supreme Court in ***Sulthan Said Ibrahim V/s. Prakasan and Others***¹. According

1 2025 SCC OnLine SC 1218

to him, once the Judge, of the Family Court has taken a view on a particular issue and has recorded a finding on that issue, he cannot take a contrary view at a further stage in the same suit, as it would operate as *res judicata*.

16. The other ground raised by the Petitioner is that, it is not necessary to execute the sale deed for claiming partition. The right of the Petitioner is established by the Annexure II of the Agreement to Sale, which is a registered document. It contains names of both, the Petitioner as well as the Respondent and the entire stamp duty is paid on the document, on the value of the property.

17. Reliance is placed on the explanation in Schedule I of Article 25 of the Maharashtra Stamp Act, 1958, which provides that in case of an 'Agreement to Sale' of immovable property, if the possession of any immovable property is transferred or agreed to be transferred to the purchaser before the execution or at the time of execution or after the execution of such agreement, then such 'Agreement to Sale' shall be deemed to be a conveyance and stamp duty thereon shall be

leviable accordingly. Considering the explanation, the title of the Petitioner is perfect and does not require 'a sale deed' to be executed for the conferment of title.

18. It is his further submission that the admission given by the husband in his Written Statement that the wife is co-owner, is not required to be proved. The admission itself makes the the Petitioner entitled for the relief of passing of preliminary decree.

19. According to him, from the very fact of admission given by the Respondent about the jointness of ownership of the Petitioner and the Respondent, makes the Petitioner entitled to the share in equal ratio along with the Respondent-Husband. No sooner it is admitted by the husband that the wife has a share to extent of 50%, the said fact need not be proved.

20. It is, therefore, submitted that the order passed by the Judge, Family Court, is erroneous, self-contradictory and contrary to the provisions of law. Hence, it deserves to be quashed and set aside.

21. *Per Contra*, Mr. Vyas, the learned Counsel appearing for the Respondent, submits that though the property is purchased in the joint names of the Petitioner and the Respondent, mere averment does not make wife entitled to such property. The Court is required to consider issues regarding the maintainability of the Petition, ownership of property, whether the Petitioner is entitled for the relief claimed and also whether the Court has jurisdiction to try and entertain the suit before passing a decree. Unless the issues are decided by leading evidence, a preliminary decree is not capable of being passed.

22. It is further submitted that in the Written Statement itself, there is an averment that the sale deed of the property has not been executed and final conveyance deed has not been registered between the original owner and the parties. Therefore, with a defective title of property, which involves third party interest, it is not permissible to draw a preliminary decree. Such relief claimed by the Petitioner is premature.

23. I have given due consideration to the arguments

advanced by respective Counsel and after hearing the respective parties at length, the question that arises before this Court is, ‘whether the relief of drawing a preliminary decree and the consequential reliefs, denied by the impugned order deserves interference by this Court?’

24. The Preliminary decree is explained in Section 2 (2) of the CPC, which reads thus:

“(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

“Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;”

25. So far as the partition suit is concerned, the enabling

provision is Order XX Rule 18. The Sub-clause 2 of Rule 18 of the Order XX, reads thus:

“18. Decree in suit for partition of property or separate possession of a share therein.-Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

(1)

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.”

26. The Petitioner is claiming relief of passing of preliminary decree as provided under Sub-Section 2 of Rule 18 of Order XX. Upon going through the application filed by the Petitioner, the ‘Say’ filed by the Respondent, and the impugned order, it is apparent that the Petitioner is relying on the averment made in the Written Statement about admission of jointness of ownership of the suit flat. This averment is claimed to be an admission given by the Respondent. It is worthwhile to note that though the Respondent has made an averment about the joint ownership, however, Respondent has also categorically

denied the entitlement of the Petitioner by taking a stand that he has purchased it by making payment of full consideration without contribution from the Petitioner from his own funds and also by availing loan. The loan which is obtained on the said property is still an encumbrance on the property. Hence, there is a denial of right and entitlement of the Petitioner, considering the denial by the Respondent, merely because there is an averment about jointness in ownership, it does not make the Petitioner entitled to claim preliminary decree, unless the right of the Petitioner is established by framing of issues and leading evidence.

27. In the present case, it is not in dispute that evidence of the parties is yet to be recorded. The pleadings of the parties about the payment of consideration and their respective shares are required to be proved by leading evidence. This being the admitted position, the other issues raised by the Petitioner does not deserve consideration.

28. It would be apposite to refer to the judicial pronouncement of the Hon'ble Supreme Court in the case of

*Shub Karan Bubna @ Shub Karan Prasad Bubna V/s. Sita Saran Bubna & Others*². The ratio of the reported judgment is squarely applicable in the present case.

29. It is held by the Hon'ble Supreme Court that in a suit for partition and separate possession, the prayer is not only for declaration of plaintiff's share in the suit property, but also division of its share by metes and bounds. This involves three issues:

- (i) Whether a person seeking division has a share or interest in the property?
- (ii) Whether he is entitled for the relief of partition and separate possession?
- (iii) How and in what manner the property should be divided by metes and bounds?

30. In the first stage of the suit, the Court decides whether the Plaintiff has a share in the property and whether he is entitled to division and separate possession. The decision of

² (2009) 9 SCC 689

these two issues results into a decree, which is passed under Order XX Rule 18, which is termed as preliminary decree.

31. In view of the aforementioned observations of the Hon'ble Supreme Court, there remains no ambiguity, on the issue that even for drawing of preliminary decree for deciding the entitlement of share, a person claiming share in the property is required to prove that he has a share or interest in the property and he is entitled to relief of division and separate possession by leading evidence, unless the share is not disputed.

32. Hence, in view of the background of the observations made by the Hon'ble Supreme Court upon going through the reasons for rejection of application for granting preliminary decree, I do not find any perversity in the findings recorded by the Judge, Family Court. The Judge, Family Court, has rightly observed that the parties, have to lead evidence, only upon leading evidence, a preliminary decree is capable of being drawn, it is on this premise, the application has been rightly rejected.

33. By invoking powers of this Court under Article 227 of the Constitution of India, the Petitioner has challenged the order below Exhibit 37 passed by the Family Court No.6, Pune. So far as the power of the High Courts under Article 227 is concerned, they are limited and are to be exercised sparingly. No interference is to be caused in the orders passed by the subordinate Courts over whom the High Court has power of superintendence, merely because the decision is erroneous. The powers under Article 227 cannot be exercised to correct the error of fact or law. The powers under Article 227 are to be exercised only to correct the jurisdictional errors committed by the subordinate Courts. Only in case of failure to exercise powers or exercise of powers leading to miscarriage of justice, the High Courts may interfere with the orders passed by the subordinate Courts or Tribunals. This position of law has been time and again considered and reiterated in its various judicial pronouncements by the Hon'ble Supreme Court. The decision of *Rajendra Diwan V/s. Pradeep Kumar Ranibala & Another*³ has squarely laid down the parameters for exercise of powers under Article 227 of the Constitution of India. In

³ (2019) 20 SCC 143

Paragraph Nos. 85 and 86, which reads thus:

“85. The power of superintendence conferred by Article 227 is, however, supervisory and not appellate. It is settled law that this power of judicial superintendence must be exercised sparingly, to keep subordinate courts and tribunals within the limits of their authority. When a Tribunal has acted within its jurisdiction, the High Court does not interfere in exercise of its extraordinary writ jurisdiction unless there is grave miscarriage of justice or flagrant violation of law. Jurisdiction under Article 227 cannot be exercised “in the cloak of an appeal in disguise”.

“86. In exercise of its extraordinary power of superintendence and/or judicial review under Articles 226 and 227 of the Constitution of India, the High Courts restrict interference to cases of patent error of law which go to the root of the decision; perversity; arbitrariness and/or unreasonableness; violation of principles of natural justice, lack of jurisdiction and usurpation of powers. The High Court does not re-assess or re-analyse the evidence and/or materials on record. Whether the High Court would exercise its writ jurisdiction to test a decision of the Rent Control Tribunal would depend on the facts and circumstances of the case. The writ jurisdiction of the High Court cannot be converted into an alternative appellate forum, just because there is no other provision of appeal in the eye of the law.”

34. In the present case, though the Petitioner may have

raised certain arguable grounds, however, they are not relevant, for deciding the issue involved in the impugned order below Exhibit 37. It is well reasoned order, which is very much within the contours of law, hence, does not call for interference. As a result, Writ Petition is dismissed.

35. Rule is discharged.

[MANJUSHA DESHPANDE, J.]