



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

WRIT PETITION NO. 7435 OF 2019

1. Vishnu S/o Rambhau Karande
age : 60 years, Occ. Agriculturist,
R/o Harnkhed, Tahsil – Malkapur,
District – Buldana
2. Nirmala W/o Dnyandeo Bhole,
age : 66 years, Occ : Household
R/o Tandulwadi, Tahsil – Malkapur,
District – Buldana
3. Asha Ashok Naphade,
age : 56 years, Occ : Household
through Sachin Ashok Naphade,
R/o Radhakrishna Society, Malkapur,
Tahsil – Malkapur, District – Buldana

.. Petitioners

Versus

1. Tulsabai Purushottam Kolte
age : 75 years, Occ : Household,
R/o Narvel, Tahsil – Malkapur,
District – Buldana
2. Prakash Rambhau Karande,
age : 59 years, Occ : Business,
R/o Kalpana Apartment,
Plot No.39/40, Atre Layout,
Nagpur District Nagpur.
3. Rajendra Rambhau Karande,
age : 49 years, Occ : Business,
R/o Kalpana Apartment,
Plot No.39/40, Atre Layout,
Nagpur District Nagpur.
4. Smt. Padmini Vilas Kolte,
age : 72 years, Occ : Household,
R/o Shivkrupa Chawl, Room No.11/2
Kapote Nagar, Thankar Pada,
Kalyan West, District Thane 421301

.. Respondents

5. Smt. Usha Baliram Kolte (Dead)
through legal representatives,

A. Suhas Baliram Kolte
age : 55 years Occ : not known

B. Milind Baliram Kolte
age : 53 years, Occ : not known

C. Upendra Baliram Kolte
age : 48 years, Occ : not known

All respondents 5A to 5C are
R/o Plot No.95, Telecom Colony,
Ushakala Building, Pratap nagar,
Khamla Nagpur

6. Indira @ Pushpa Sudhakar Patil
age : 54 years, Occ : Household,
through Sudhakar Bhaskar Patil,
R/o A-501, Sunder Nagar,
Near Gajanan Maharaj Temple,
Adjacent to Manisha Nagar,
Kalyan, District Thane

.. Respondents

Mr. R.N. Badhe, Advocate for petitioners.

Mr. A.S. Manohar, Advocate for respondents.

CORAM : ABHAY J. MANTRI, J.

DATE : FEBRUARY 26, 2025

ORAL JUDGMENT

Heard. **Rule.** Rule made returnable forthwith. Heard finally
with the consent of the learned counsel appearing for the parties.

(2) The petitioners are assailing the order dated 26/08/2019,
passed in MJC No.05/2015 in R.D. No. 04/2008 by the learned 2nd
Joint Civil Judge Junior Division Malkapur (for short- the 'learned

judge'), which rejected the objection raised by the petitioners under Section 47 of the Code of Civil Procedure (for short-'CPC').

(3) In brief, the facts are that the original plaintiff Parvatibai filed a suit against the petitioners and respondents No.2 to 6 for partition and separate possession of movable and immovable properties bearing Regular Civil Suit No.63/1981(for short-'RCS'); the same was decreed on 19/04/1984. Against the said decree, the petitioners preferred the First Appeal before the District Court and the Second Appeal, bearing No.309/1988, before this Court. The Second Appeal was dismissed with modification in the judgment and decree passed by the trial Court on 05/04/2005. Thereafter, the respondent No.1, being the legal heirs of Parvatibai, i.e., the decree holder, has filed the execution proceeding bearing Regular Darkhast No.04/2008. During the pendency of the said execution, petitioners filed an objection under Section 47 of CPC on 05/10/2015. Similarly, the decree holder filed an application for the determination of the valuation of the property mentioned in Schedules 3 and 4 as per the market rate as of 05/10/2015. The application was allowed on 12/01/2018, and the judgment debtor was directed to determine the market value of the properties mentioned in Schedules 3 and 4. The petitioners did not challenge the said order; however, subsequently, the objection raised by the petitioners was registered as MJC No.05/2015, and the learned Judge, after considering the same, rejected the same on 26/08/2019.

Being aggrieved by the same, the petitioners have filed this petition.

(4) Learned counsel for the petitioners vehemently contended that they have not received any property as mentioned in Schedules 3 and 4 from their father. It is further claimed that the movable properties and livestock are not in existence. Therefore, the decree in respect to the same cannot be executed, and consequently, he has moved this application and urged for allowing the petition.

(5) *Per contra*, the learned counsel Mr. Atharva Manohar, for respondent No.1, vehemently resisted the petition, contending that the petitioners have not challenged the order passed by the Court below at Exh.95 on 12/01/2018 and, therefore, by way of objections, the petitioners cannot challenge the impugned order. The learned Judge has already decided the application on 12/01/2018, and consequently, the subsequent order is hit by the principle of "*Res judicata*" as subsequent objection is not tenable. The learned Trial Court has already decided the said question. Therefore, the same cannot be re-agitated, or it would not be appropriate to re-consider the said objection afresh by the Trial Court. To substantiate his contention, he has relied upon the decision of the Hon'ble Apex Court in the case of ***C.V. Rajendran vs. N.M.Muhammed Kunhi*** reported in **(2002) 7 SCC 447** and pointed out para 6. Thus, he submitted that the order passed by the learned Trial Court is just and proper and no interference is required; hence, he urged to dismiss the petition.

(6) I have appreciated the submissions of learned counsel for both parties. Original Judgment Debtors/respondents No.2 to 6 though served chose to remain absent. Perused the impugned order and record, as well as judgment relied upon by learned counsel for the respondent No.1.

(7) At the outset, it appears that on 19/04/1984, the trial Court passed judgment and decree. The petitioners challenged said judgment and decree before the District Court and this Court. This Court has dismissed the Second Appeal no.309/1988; however, it modified the judgment and decree passed by the learned trial Court to the extent that "*Tulsabai, legal heir of respondent Parvatibai, holding that she is entitled to a 1/4th share in the suit property and, therefore, entitled to separate possession thereof.*"

(8) It further appears that in 2008, the decree holder filed an execution petition bearing Regular Darkhast No.04/2008. During the pendency of the said petition, the petitioners filed an application under Section 47 of the CPC and objected to executing the decree to the extent of Schedules 3 and 4 of the decree, as they have not received the said movable properties and livestock from their father, and the same is not in existence. The said objection was reagitated in MJC No.05/2015. Similarly, the decree holder respondent No.1 filed an application in an execution petition to determine the market value of the properties mentioned in Schedules 3 and 4 and for the release of

1/4th share of the respondent No.1 Tulsabai in her favour. Likewise, the respondent No.1 filed a reply to the objection raised by the petitioners.

(9) After considering the record, the learned Trial Court allowed the application Exh.95, thereby directing the judgment debtors to determine the market value of the properties mentioned in Schedules 3 and 4. The said order was passed on 12/01/2018. However, the petitioners have not challenged that to this date. But the petitioners are challenging the order passed in MJC No.05/2015, which was passed subsequent to the order passed on Exh.95. The learned Trial Court, while passing the order, observed that Rambhau had the movable properties, and after his demise, it came to the possession of the applicants. So, they are bound to bring these movable properties to satisfy the decree.

(10) The learned Trial Court has considered the order passed below Exh.95 and all the other aspects, as well as the Commissioner's report on record, and held that no substance has been found in the objection raised by the petitioners and rejected the petition. However, learned counsel for the petitioners failed to point out the illegality and perversity of the impugned order. *Per contra*, it seems that the petitioners are not disputing that the properties mentioned in Schedules 3 and 4 were in Rambhau's possession, but they only contended that they did not receive them from him and that they were not in existence. Even assuming the contention of learned counsel for

the petitioners that they have not received the same or not in existence, then in that case, the decree holder could not be able to execute the same to that extent and if it is in existence or available with the petitioners then respondent No.1 can able to execute the decree to that extent. If respondent No.1 is permitted to execute the decree with respect to Schedules 3 and 4 in question, it would not cause prejudice to the petitioners; on the contrary, it would help to determine the controversy between the parties. For that purpose, I also do not find substance in the objection raised by the learned counsel for the petitioners. *Moreover*, the petitioners admittedly did not challenge the order dated 12/01/2018, which passed below Exh.95.

(11) In the aforesaid background, in my view, the petition is bereft of merit; as such, it stands dismissed. No costs.

Rule is discharged. Inform the learned trial Court accordingly.

[ABHAY J. MANTRI, J.]

KOLHE