



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.7460/2024

Smt. Nanibai wd/o Laxmanrao
Navkhare Since deceased through
LRs -

1. Ashok Laxmanrao Navkhare
Aged 68 years, Occ.: Motor Garage,
2. Gajanan Laxmanrao Navkhare
Aged 61 years, Occ.: Motor Garage,
3. Ramrao Laxmanrao Navkhare
Aged about 58 years, Occ.: Agriculturist,

All R/o Datta Wadi, Near Dattatray
Nursery, Badnera Road, Amravati.

... PETITIONERS

...VERSUS...

Vitthalrao Marotrao Navkhare,
Aged 86 years, Occ.: Motor Garage,
R/o Nanakshahi Wada, Namuna Galli
No. 6, Namuna, Amravati, Tq. & Dist.
Amravati.

Through his Spl. Power of
Attorney holder -
Manohar Vitthalrao Navkhare,
Aged about 52 years, Occ.: Agriculturist,
R/o Nanakshahi Wada, Namuna Galli
No. 6, Namuna, Amravati, Tq. & Dist.
Amravati.

...RESPONDENT

Shri J.J. Chandurkar, Advocate for petitioner
Mr S.W. Deshpande, Advocate for respondent

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 21/03/2025

DATE OF PRONOUNCING THE JUDGMENT: 28/03/2025

JUDGMENT

Rule. Rule made returnable forthwith.

2. Heard learned Counsel for the petitioner.

3. By consent and on request of parties petition is taken up for final hearing at the stage of admission. Being aggrieved by the order dated 03/12/2024, passed below Exhibit 27 together with order dated 20/12/2024, passed below Exhibit 41 by the learned Civil Judge Senior Division, Amravati, in Special Darkhast No. 82/2024, by which, the learned Executing Court was pleased to allow the application file by the respondent for sending the

precept to District Collector, Amravati, for execution of degree and appointment of Court Commissioner.

4. The respondent had filed suit for partition and separate possession against the petitioners and others in respect of two house properties and six agricultural land. The petitioners are the original Judgment Debtor Nos. 1 to 3 whereas, respondent No. 3 is the original degree holder in Special Darkhast No. 82 of 2024 filed for enforcement of the judgment and degree dated 14/11/2008, passed by the learned District Judge 3, Amravati. In Special Civil Suit No. 286/2005. The learned Trial Court vide judgment and decree dated 29/02/2006 decreed the suit in part thereby granting half share in favour of respondent/plaintiff in Field Survey No. 22/1/A(Gut No. 54), admeasuring 2H 7R of Village Shendola, Taluka Tiosa, District Amravati, 2008. The said order was

challenged before the Appellate Court. The learned First Appellate Court vide judgment and degree dated 14/11/2008 set aside the judgment and decree dated 29/02/2006 and decreed the suit thereby granting half share to the respondent in all the suit properties. The aforesaid judgment is the subject matter of challenge in the present writ petition.

5. It is contention of the petitioner in view of the preliminary decree passed by the First Appellate Court, the proceeding for drawing or final decree ought to have been initiated by the respondent by making formal application as it is the final decree which is executable and not preliminary degree. Without initiating of the proceeding for final decree, the respondent on or above 05/08/2024 filed execution under Order 21, Rule 35 of the Code of Civil Procedure for enforcement of the judgment and

decree dated 14/11/2008. The said execution was filed on 05/08/2024, was numbered as Special Darkhast No. 82/2024.

6. Respondent filed application for sending the precept to District Collector and for appointment of Court Commissioner. The said application was at Exhibit 27. Upon hearing, the learned Executing Court was please to allow the application vide order dated 03/12/2024. By this order the Collector or any Gazetted Subordinate Officer of the Collector deputed by him in his behalf are directed to partition agricultural land which are mention in Schedule page No. 13 of original suit, mentioned in Special Civil Suit No. 286/2005, by metes and bounds as per shares declared in the judgment and decree. By the said order Advocate H.P. Jain came to be appointed as Court Commissioner for partition and separate position of

house property. The present petitioner filed review application for review of order passed below Exhibit 27. In the said review, the order by Appellate Court is reproduced. The said judgment and decree was maintained up to the Supreme Court and preliminary decree passed by the Appellate Court is confirmed. Thus, proceeding between the parties comes to an end on 08/04/2024.

7. It was contention of the petitioner in review petition that preliminary decree is drawn between the parties declaring the respective shares in the suit scheduled properties. It is incumbent on plaintiff/decreed holder to file application for final decree proceeding under Order 20, Rule 18 (1)&(2) of the Code of Civil Procedure before the Court and without passing the final decree by the Hon'ble Court the plaintiff/decreed holder has started

the execution proceeding on the basis of preliminary decree which is pre-matured one and is not maintainable in the eyes of law.

8. The judgment debtor placed reliance on various judgment, however, the learned Civil Judge Senior Division, rejected the application below Exhibit 41 vide order dated 20/12/2024. It is contended that the precept is to be sent to the Collector for preparing scheme for partition and agricultural landed property and after finalizing the scheme for partition of both house properties and agricultural land the valuation of the properties allotted to the plaintiff is to be done and thereafter plaintiff/decreed holder has to pay non judicial stamp paper to engross the final decree on the said stamp paper. His application for review was rejected. Being aggrieved by the said rejection and being aggrieved by the

order below Exhibit 27 on the application for sending the precept and for appointment of Court Commissioner dated 03/02/2024, present petition is preferred. The application was rejected on the ground that though nomenclature is execution of decree but it is nothing but petition under Order 20, Rule 18 and Section 54 of the Code. It is further observed that moreover, it is to be mentioned here that there is no provision for executing partition degree in order 21 of the Code.

9. The learned Counsel for petitioner relied on following citations :

- 1. Somnath S/o Punja Bargal and another Vs. The Hon'ble Minister, Revenue Department, Maharashtra State, Mantralaya, Mumbai and others.*
- 2. Sadashiv and others Vs. The State of Maharashtra and others, 2024(3) ALL MR 538*

3. Kattukandi Edathil Krishnan and another Vs. Kattukandi Edathil Valsan and others, AIR 2022 SCC 2841

4. Shankar Balwant Lokhande (Dead) by L.Rs. Vs. Chandrakant Shankar Lokhande, 1995 AIR 1211

10. Learned Counsel for respondents supported the order passed by learned Civil Judge Senior Division, Amravati. Learned Advocate Mrs S. W. Deshpande, contended that the Collector is empowered to effect partition and hand over the possession. Therefore, there is no interference require in the order passed by the lower authority and it also needs to be confirm.

11. Heard both the parties. Perused applications, orders passed thereon. There is one more application filed by the petitioner for dismissal of execution proceeding as pre-matured and not maintainable in law. It was contention of the petitioner in the said application that the

plaintiff/decreed holder has filed execution for executing preliminary decree passed in RCA No. 69/2008, dated 14/11/2018, by the learned Appellate Court. It was also claimed in the said application that the preliminary decree is drawn between the parties declaring the respective shares in the suit scheduled properties. It is incumbent on plaintiff/decreed holder to file application for final decree proceeding under Order 20, Rule 18 (1) and (2) of the Code of Civil Procedure before the Court, without passing final decree by the Court. The plaintiff/decreed holder has started the execution proceeding on the basis of preliminary decree which is pre-matured one and is not maintainable in the eye of law. This application also came to be rejected on the ground that the suit is disposed of by judgment and decree of the Trial Court and in appeal the decree is set aside and share of the parties were determined which is upheld upto the Hon'ble Apex Court.

Hence, as per decree it will be legal and proper to issue receipt as per Section 54 of the Code for partition of landed property. It is also held by the Executing Court that Court does not find any error apparent on record nor it feels that this application is pre-matured or not tenable.

12. The learned Counsel for petitioner drawn my attention to the Maharashtra Land Revenue (Partition of Holdings), Rules, 1967, which are framed in exercise of power conferred under Maharashtra Land Revenue Code. Rule 5, 6, 7 & 9 reads as under :

“5. Mode of effecting partition - If the Collector does not reject the application, he shall proceed to effect the partition either personally or through such agency as he may appoint. So far as practicable, whole survey numbers or sub-division of survey numbers shall be allotted and recourse to further division as far as possible, be allotted to each party and care should be taken to ensure that the productivity of the area allotted to each party is in proportion to his share in the holding.

6. Apportionment of assessment - *The assessment of the holding shall be distributed in proportion to the shares held, in the holding by the co-holders, so however that when the total assessment of all the sub-divisions of any survey number in such holding falls short of, or exceeds, the whole assessment of that survey number, the difference shall be equitably distributed over the sub-divisions by addition or deduction in the assessment so as to make the total equal to the assessment of the parent survey number.*

7. Procedure before confirmation of partition - *After the partition has been completed, the Collector shall hear any objections which the parties may make, and shall either amend or confirm the partition. The partition shall take effect from the commencement of the agricultural year next following the date of such amendment or confirmation of the partition.*

9. Partition under decree of Civil Court - *When any holding is ordered to be partitioned under decree or order of a Civil Court, the provisions of Rules 5, 6 and 7 shall apply as they apply in relation to partition of a holding on the application of a co-holder.”*

13. Thus, Rule 5, 6 and 7 shall made applicable as they apply in relation to partition of a holding on the

application of a co-holder. Rule 7 provides about procedure before confirmation of partition.

14. Learned Counsel also placed reliance on judgment in *Writ Petition No. 6924/2009, (Somnath s/o Punja Bargal and another Vs. the Hon'ble Minister, Revenue Department, Maharashtra State and others), dated 21/11/2009*, wherein, similar question involved before the Bombay High Court, wherein, the Rules 5, 6, 7 and 9 were considered and the Court held in paragraph No. 5 as under :

“5] Perusal of the entire scheme would, therefore, reveal that effecting partition is not only a ministerial act. The authorities are required to see that the partition is done in an equitable manner, so as to ensure that the productivity of the area allotted to each party is in proportion to his share in the holding. It is also to be noted that before the final partition is effected, the Collector is required to hear the objections, if any of the parties have, regarding the partition which is completed. Though in the affidavit in reply it is stated that the procedure

as prescribed has been followed and though the learned AGP Shri More and Shri Hon, appearing for the respondents strenuously urged the court to accept the submission that the rules have in fact been followed, perusal of the material placed on record would reveal that the rules have not been followed by the authorities. It could be seen that after the partition was completed by the Taluka Inspector of Land Record, he has sent the same for approval of the Collector in the month of October, 2006. The Collector, vide communication dated 9/11/2006, had directed the Tahsildar to sanction the partition chart prepared by the TILR and thereafter, to take steps for giving possession to the parties. Thereafter, immediately notices have been issued on 20/11/2006 and 25/6/2007 for handing over the possession.”

15. In view of Section 85 and Section 328 of the Maharashtra land Revenue Code the rules framed which are to be followed by Collector while partition of land.

16. The learned Counsel also placed reliance on judgment of ***Sadashiv*** (supra), wherein the similar

question was raised and answered by this Court.

“14. The question is, can Collector effect the partition as per the precept sent to him under section 54 of the C.P.C. without final decree ?

*26. In the case of **Somnath (supra)**, this Court was dealing with an identical issue. In the said pronouncement, the Court discussed Section 85 of the Code, 1966 and the relevant Rules of the Rules 1967. It has been observed that it can thus clearly be seen that though the T.L.L.R. has prepared the partition chart, the provisions of Rule 7 of Rules, 1967, which require a hearing to be given to the parties before the Collector confirms the partition is to be followed. Sub-section (3) of Section 85 of the Code mandates a hearing by the Collector before dividing holding and apportioning the assessment of the holding. The said section also mandates following the procedure in accordance with the law and the rules framed by the State Government.*

34. The term after the partition is completed is to be read in the context of the procedure laid down in the Rules 1967 and section 54 of the C.P.C. After the precept is received by the Collector, he has to hear the parties as provided under sub-section (3) of Section 85 of the Code, 1966. Then, he has to proceed to effect the partition as contemplated under Rule 5 of the Rules 1967. Then, he has to apportion the

assessment. In the meantime, he has to ensure that the land proposed for the partition can be partitioned without violating the provisions of the Fragmentation Act and that its partition is possible. These exercises are done to know himself and the parties concerned that the proposed shares by the Land Records office are suited to all and there is no inequitable partition. In this context, the term after the partition is completed means after the process of measurement and preparation of the partition chart, and it does not mean after the actual partition is effected. For example, if the actual partition is effected, what remains thereafter for hearing, modification, and amendment of the partition or confirmation? Obviously, nothing would remain because the respective shareholders are given separate possession. Once the partition is effected, a further process is to prepare a revenue record. Reading the said term in the context mentioned above, the Court is of the view that the term after the partition is completed' means after the land is measured and the partition chart is prepared by the Office of the Land Records and submitted to the Authority effecting the partition. Completing partition, as provided in Rule 7 of the Rule, is the pre-stage of giving the effect to the partition decree by actual separation and handing over possession of the share by metes and bounds.”

17. Learned Counsel for petitioner relied on ***Kattukandi Edathil Krishnan*** (supra), the judgment of Hon'ble Apex Court relied on by the petitioner, wherein, in paragraph Nos. 30 and 33 held as under.

“30. It is clear from the above that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. Thus, fundamentally, the distinction between preliminary and final decree is that: a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in preliminary decree and after the inquiry having been conducted and rights of the parties being finally determined, a final decree incorporating such determination needs to be drawn up.

33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the

matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn.”

18. Learned Counsel for petitioner also placed reliance on ***Shankar Balwant Lokhande*** (supra), in support of his contention that suit continues even after passing of the preliminary decree till the final decree is passed. The preliminary decree is not executable unless the final decree is passed specifying the shares of each share holder by metes and bounds and the same is engrossed on stamped paper till there is no executable decree which may attract residuary Article 182 of old Limitation Act. The Hon’ble Apex Court in paragraph No. 12 held as under :

*“12. As to **Maksudan's case** (supra), we state that it had not been correctly decided. Limitation*

does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing final decree does not amount to passing a final decree. Until the final decree determining the rights of the parties by metes and bound is drawn up and engrossed on stamped paper(s) supplied by the parties, there is no executable decree. In this behalf, it is necessary note that Section 2(a) of the Bombay Stamp Act, 1958, as amended by the local Act provides that a decree of civil court is required to be stamped as per Article 46 in Schedule-I. Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped". Therefore, executing court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s), it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged in Order 20 Rule

18(2), attracting residuary Article 182 of the old Limitation Act. Contrary views of the High Courts, are not good law. A Division Bench of the Andhra Pradesh High Court In Smt. Kotipalli Mahalakshamma v. K. Ganeswara Rao, AIR 1960 Andhra Pradesh 54, correctly decided the question of law which held that the limitation begins to run only after a final decree is engrossed on stamped papers.”

19. Similar is the view taken in ***Shankar Balwant Lokhande*** (supra). It is also held in the said judgment in **paragraph No.12** that the Executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20, Rule 18(2). After the final decree is passed and direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s), it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute a final decree, crystallizing

the rights of the parties in terms of the preliminary decree. Till then, there is no executable degree as envisaged in Order 20, Rule 18(2). The only grievance of the petitioner appears to be that the judgment and decree passed by the Appellate Court ought to have specifically passed the order to follow the Order 20, Rule 18(2).

20. In view of the above position learned Executing Court ought not to have been received the execution under Order 21, Rule 35 of the Code of Civil Procedure for enforcement of judgment and decree dated 14/11/2008 without initiation of proceedings for final decree. After filing the application the respondent also filed application for sending the precept to District Collector, which was allowed by the Executing Court. By way of review application, the petitioner tried to convince the Court that preliminary decree is not maintainable unless and until

final decree is drawn. In my considered opinion, learned Executing Court committed an error in entertaining the execution filed on the basis of preliminary decree contrary to the provisions of law and judgments of this Court as well as Hon'ble Apex Court. The final decree engrossed on the stamp paper would be acceptable decree and preliminary decree cannot be executed or the execution cannot be filed for executing the preliminary decree passed in the partition suit. Thus, the execution filed by the decree holder is pre-matured and is liable to be dismissed.

21. In my considered opinion, the Executing Court ought not to have rejected the review application in view of provisions of Order 20, Rule 18 (1)&(2) of the Code of Civil Procedure. The application filed for execution is not filed adopting due procedure. It appears that Executing

Court without following any procedure received the execution application. It has prescribed procedure that there has to be preparation of scheme for partition and after finalization of the scheme valuation of the property was to be carried out and the decree holder was required to pay non judicial stamp to engross the final decree, otherwise objections if any, by either of the party could be raised. What is held in above judgments, it is very much clear that no such execution is receivable unless there is a final decree and there is prescribed procedure for passing of final decree. Hence, I proceed to pass the following order:

ORDER

- i) The Writ Petition is allowed.
- ii) The order passed below Exhibit 27 dated 03/12/2024, needs to be **modified** by adding following direction at the end of Clause 2 and 3, “by following

procedure prescribed under Maharashtra Land Revenue Code (Partition of Holdings) Rules, 1967, specifically paragraph Nos. 5, 6, 7 and 9”

iii) Clause (5) is hereby deleted

iv) In view of order of modification, order below Exhibit 41 passed on 20/12/2024 is quashed and set aside. Even application for review does not survive.

v) Order below Exhibit 42 dated 20/12/2024, application for dismissal of execution as premature and not maintainable in law, is hereby suspended till passing of final decree. There cannot be any execution of preliminary decree. After passing of final decree the learned Executing Court may decide application for execution.

(SMT. M.S. JAWALKAR, J.)

Jayashree..