

(2001) 02 BOM CK 0078

In the Bombay High Court

Case No : Civil Revision Application No. 989 of 2000

Annasaheb Rajaram Nagane and Another

APPELLANT

Vs

Rajaram Maruti Nagane and Others

RESPONDENT

Date of Decision : 21-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, 11, 45
Limitation Act, 1963 — Article 136

Citation : AIR 2001 Bom 303 : (2001) 3 MhLj 53

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : S.G. Page, for the Appellant; J.B. Patil and A.J. Chougule, for the Respondent

Judgement

V.C. Daga, J.—The crucial question for consideration is : Whether there is bar of limitation to the application being sent to the Collector in order that he may carry out direction given in a decree in the form set out in Order 20, Rule 18(1) of Civil Procedure Code, 1908?

FACTUAL MATRIX

2. Factual matrix lies in narrow compass and it is this :

The petitioners are the original plaintiffs and decree holders in Civil Suit No. 74 of 1975 filed by them on 13th October 1975, for partition and separate possession of movable and immovable properties inter alia including the agricultural lands being revised survey Nos. 154/2 and 155/2 situated at Baaj, Taluka Jat, District Sangli. The said suit came to be decreed on 27th November and the learned Civil Judge, Junior Division, Jat declared that the petitioners were entitled to 8/55th share in the suit property inasmuch as they were entitled to separate possession of the suit lands. It was further directed that the petitioner would be entitled to get 1/6th share in the suit property described in paragraph-2B of the plaint and possession thereof to the extent of 1/6th share therein. It was further directed

that the respondents, who were original defendants and judgment debtors would be liable to pay mesne profits from the date of the suit in respect of 8/55th share of the property described in paragraph-2A of the plaint. The decree for partition and delivery of possession, being a decree involving an estate assessed to the payment of revenue to the Government, the learned single Judge, in accordance with the provisions of Section 54 of Civil Procedure Code, 1908 ("C. P. C." for short) directed, in the decree, that the partition, division and separation to be made by the Collector in accordance with declaration therein.

3. The applicants/decreed holders filed an execution application, being Regular Darkhast No. 19 of 1984, in the Court of Civil Judge, Junior Division, Jat for execution of the said decree. The learned executing Court, by the order dated 23rd April 1984 directed that papers be sent to the Collector, Sangli for partition of the suit lands in pursuance of the decree. In spite of the said order, no action was taken by the office of the Court of the Civil Judge, Jat for sending necessary papers to the Collector, Sangli. Ultimately, by the fresh order dated 12th August 1986, the executing Court redirected its office to send papers to the Collector, Sangli for effecting partition as per decree.

4. The Collector of Sangli after receipt thereof, on 12th August 1986, in turn, sent the said papers to the District Inspector of Land Records ("DILR" for short), who took his own time, and after lapse of considerable time, vide his letter dated 21st April 1988 brought to the notice of the executing Court that the survey numbers of the lands mentioned in the decree was not in existence, in view of the implementation of consolidation scheme to the area in question. Consequently, new Gat numbers have been marked and/or given to the lands referred to in the decree. The DILR, therefore, sought the correct Gat numbers with correct area thereof; inasmuch brought it to the notice of the executing Court that part of the suit lands had been transferred, during the pendency of the litigation, to the third parties as such emphasised the necessity of making them parties to the Darkhast application and requested for details in including their names.

5. It appears that after receipt of the above reference from the DILR, the executing Court called upon the applicants/decreed holders to supply necessary details sought by the DILR. However, the executing Court, finding non-compliance of the order, passed an order dated 5th January 1990 and granted seven days time by way of last chance so as to enable the decree holders to comply with the order dated 5th January 1990, which was, initially, passed behind their back. However, the applicants/decreed holders did not comply with the said order, with the result, execution application came to be dismissed for default on 4th December 1992.

6. The applicants/decreed holders, for the first time, came to know of the above order of disposal of execution application some time in the month of December 1995/January 1996. The applicants after receipt of certified copy of the order, preferred Civil Miscellaneous Application No. 10 of 1997 on 6th March 1996. for

restoration of Regular Darkhast No. 19 of 1984 which, ultimately, came to be dismissed by an order dated 31st March 1998 inter alia holding that it was barred by limitation.

7. On 9th April 1998, second Regular Darkhast No. 12 of 1998 was preferred by the applicants for execution of decree obtained on 27th November 1981. The executing Court, by its order dated 5th May, 2000, dismissed second Regular Darkhast No. 12 of 1998 inter alia holding that the said Darkhast was also barred by law of limitation as prescribed under Article 136 of the Limitation Act 1963 and also held that execution application was hit by the principles of res-judicata.

8. Aggrieved by the aforesaid order the applicants/decreed holders invoked revisional jurisdiction of this Court u/s 115 of C. P. C. to challenge the above order dated 5th May 2000, passed in Regular Darkhast No. 12 of 1998, on the ground that the impugned order suffers from material illegality and complete non-application of mind on the part of the executing Court.

THE ARGUMENTS

9. The learned counsel appearing for the applicants contended that the executing Court has wrongly applied the provisions of Limitation Act and erroneously held that second Regular Darkhast No. 12 of 1998 was barred by period of limitation and hit by the principles analogues to res judicata. He further contended that the executing Court ignored that until actual partition is effected by the revenue authorities, as per the directions contained in the decree, it does not attain the character of a executable final decree and therefore, Article 136 of the Limitation Act does not get attracted. In his submission, the said provision shall apply from the date of culmination of preliminary decree into an executable final decree for partition and separate possession. He contended that the impugned order passed by the executing Court not only suffers from non-application of mind but also suffers from material illegality and irregularity and went on to submit that the executing Court has illegally exercised its jurisdiction vested in it by dismissing execution application. He, in the aforesaid backdrop, urged that the impugned order, if allowed to stand, shall cause irreparable injury to the applicants/decreed holders against whom it was made. He therefore, prayed for setting aside the impugned order and also prayed for remand with direction for expeditious disposal of the execution proceeding in accordance with law considering the advanced age of the decree in question.

10. The learned counsel appearing for the applicants/decreed holders sought to place reliance on the judgment of Apex Court in the case of Shankar Balwant Lokhande (dead) by L.Rs. Vs. Chandrakant Shankar Lokhande and Another, in support of his submission that the executing Court cannot receive executable decree unless final decree is passed, drawn up and engrossed on the requisite stamped paper(s). Till such time there is no executable decree so as to attract the provisions of the Limitation Act, 1963.

11. Per-contra, submissions were made on behalf of some of the respondents/

judgment debtors in support of and justifying the impugned order. The learned counsel appearing for respondent Nos. 4 to 11 contended that the applicants/decree holders, after obtaining the decree, failed to take necessary steps within the available period of limitation viz. twelve years from the date of passing of the decree and, therefore, the decree did not remain to be an executable decree after lapse of period of limitation. In other words, in his submission, the execution taken out after lapse of twelve years was barred by limitation. The learned counsel appearing for the respondents also canvassed that the dismissal of the first execution application, namely, Regular Darkhast No. 19 of 1984 and subsequent dismissal of restoration application, seeking restoration thereof would be hit by the doctrine of res judicata and, therefore, he tried to justify the findings recorded by the executing Court in this behalf, relying upon the judgment of the learned single Judge of this Court in the matter of Damodar Bhagwant Pande, Since Deceased, By Legal Representatives and Others Vs. Narayan Bhagwant Pande, Since Deceased, By Legal Representatives and Others, , wherein this Court ruled that Explanation-VII of Section 11 of C. P. C. contemplates that provisions of Section 11 shall apply to the proceedings for execution of decree. In his submission, parties to both the execution proceedings being the same, issues between the parties being identical, the order of dismissal passed in earlier Darkhast would operate as res judicata in the subsequent execution application. He, therefore, prayed for dismissal of the present revision application with costs.

THE ISSUES

12. The substantive issues on the pleadings as between the parties are as under :

(I) "Whether the execution proceeding/ Darkhast, for execution of the decree passed under Order 20, Rule 18(1) of C, P. C. was tenable when no steps for execution thereof were taken by the decree holders within a period of twelve years from the date of passing the decree?"

(II) "Whether the subsequently instituted execution application and/or Darkhast proceeding of the nature referred to hereinabove, would be within the mischief of the doctrine of res-judicata?"

SCHEME TO ENFORCE EXECUTION OF DECREE UNDER C. P. C.

13. In order to consider the issues raised and before proceeding further with the discussion, it may be proper to read the relevant provisions leading to the scheme for realisation of the fruits of the decree. Section 2(2) of C. P. C. defines "decree" as follows :

" "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."

14. The substantive provision, namely, Section 54 appears in Part-11 of C. P. C. which bears the heading "Execution" and is one of the four sections under sub-heading "Procedure under Execution" requires that partition of estate or separation of share in the estate assessed to the payment of revenue to the Government shall be made by the Collector or any gazetted subordinate deputed by him in that behalf in accordance with law (if any) for the time being in force relating to the partition, or the separate possession of shares of such estate. Section 54 thus reads :

"54. Partition of estate or separation of share.--Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any Gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates."

15. C. P. C. under Order 20, Rule 18 provides for mechanism for execution of decrees in the suits for partition of property or separate possession of the shares therein. The said provision, thus, reads :

Order 20, Rule 18

"Decree in suit for partition 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) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any Gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(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."

The only other provision of C. P. C., other than Order 20, Rule 18, relevant for the purposes of execution of decree in suit for partition appears to be under

Order 26, Rule 13. The said provision, thus, reads :

Order 26, Rule 13

"Commission to make partition of immovable property -- Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree."

DISSECTION OF THE STATUTORY PROVISIONS

16. The Order 20, Rule 18(1) quoted hereinabove refers to a preliminary decree. The preliminary decree in a partition action is a step in the suit which continues until the final decree is passed. Where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the Court may pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further direction as may be required. In a suit for partition by a coparcener or co-sharer, the Court is not expected to give decree only for the plaintiffs share but it has to consider the shares of all the heirs after making them parties and then to pass a preliminary decree. Therefore, the preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, the subject matter of the suit.

17. The scheme of the Code makes it clear that after passing of preliminary decree for partition, the decree cannot be made effective without there being a final decree. Until rights in the final decree proceedings are worked out, qua all, and, till a final decree in that behalf is made there is no formal expression of the adjudication, conclusively determining the rights of the parties with regard to the properties for partition in terms of decree, so as to entitle the party to make an application for execution of final decree. The final decree has to specify the division by metes and bounds and it needs to be engrossed on the requisite stamped paper(s). Until final decree determining rights of the parties by metes and bound is drawn up and engrossed on stamp paper(s) supplied by the parties, there is no executable final decree in the eye of law. Therefore, the executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20, Rule 18 of C. P. C. After final decree is passed and direction is issued to pay stamp paper(s), it becomes executable or becomes an instrument duly stamped. Thus, the condition precedent is to draw up a final decree and then to engross it on stamp paper(s) of requisite value. These two acts put together constitute final decree crystallising the rights of the parties in terms of preliminary decree. Till such time, there is no executable final decree as envisaged under Order 20, Rule 18 of C. P. C.

18. It is settled position in law as found by the Division Bench of this Court in the case of Bashiruddin Khwaja Mohiuddin Vs. Binraj Murlidhar Shop at Malkapur and Others, that final decree proceedings are mere continuation of the preliminary decree proceedings and there is no executable decree unless final decree

proceedings are finally disposed of. How they are to be disposed of is set out by me in the paragraphs supra.

19. Now the one more question needs consideration as to the nature of the proceedings initiated by the Court, pursuant to the application to send decree or papers to the Collector for partition, division or separation possession. Can it be called an application in execution. The said question is not res-integra. The Division Bench of this Court in the case of D.M. Jacinto Vs. J.D.B. Fernandez, ruled as under:

"Civil P. C. (1908), Order 20, Rule 18 -- Order decreeing partition of property assessed to Government revenue and referring it to Collector to carry out partition -- Subsequent application by parties to send decree and papers to Collector is not in execution."

In the above judgment, the Division Bench of this Court had an occasion to notice the practice prevailing in mofussil. When an order of the above nature is made, it is for the parties to apply subsequently to the Judge or Court to send the decree and papers to the Collector and such form of the application is treated as an ordinary Darkhast. The Division Bench in the above judgment ruled that asking a Judge or the Court to send the papers to the Collector is really nothing but asking the Judge or Court to do a ministerial act. All that the parties, really seek is a direction to send necessary papers to the Collector and such applications do not attract provisions of the Limitation Act. Thus as per the above judgment in the case of D.M. Jacinto Vs. J.D.B. Fernandez, the order decreeing partition of the property assessed to revenue and referring it to Collector to carry out partition, and subsequent application by parties to send decree and papers to Collector is not an application in execution. Therefore, the provisions of the Limitation Act cannot be made applicable to such applications.

20. The above judgment of the Division Bench has been approved by the Full Bench of this Court in the case of Ramabai Govind Vs. Anant Daji, . One of the questions for consideration in the said case was : Whether the application to Court to send papers to Collector for partition by metes and bound was not governed by the provisions of the Limitation Act? It was held that such an application being in the nature of step in the suit rather than an application to execute the decree and hence, no period of limitation for making it was prescribed. The observation made in this behalf are as under :

"Civil P. C. (1908), Section 54, Order 20, Rule 18(1) -- Decree for partition of revenue paying lands -- Application to send papers to Collector is not governed by Limitation Act, Article 181 or 182."

21. Referring to the civil manual issued by this Court for guidance of the civil Courts, it is observed :

"This view finds support in the instructions contained in the Civil Manual issued by this Court. In Rule 1 in Chapter 12 of Vol. I of the Manual (at page 145, 1960

Edn.) preliminary decrees are divided into two classes, those in which further action for final decrees is to be taken forthwith by the Courts suo motu without any application from a party and those in which subsequent proceedings for passing final decrees do not arise as a matter of course. The former are directed to be treated as pending and shown as such in the monthly returns and the records of such suits are to be retained in the original Court until final decrees are passed therein, while the latter are to be treated as disposed of and shown as such in the monthly returns and the records should be forwarded to the record keeper of the District Court and may be called for when subsequently required. A partition decree under Order 20, Rule 18(2) is included in the former class of preliminary decrees and one under Order 20, Rule 18(1) is included in the latter class, be it noted, of preliminary decree. These instructions are being followed even since the CPC of 1908 was enacted, and a partition decree, whether under Sub-rule (1) or under Sub-rule (2), is classed as a preliminary decree."

APPLICATION OF THE PRINCIPLES DERIVED FROM THE ABOVE CASES TO THIS CASE

Issue No. I :

22. Turning to the facts of the case in hand as already noticed in the opening part of this judgment that the decree in question for partition and separate possession of the movable and immovable properties Inter alia including the agricultural lands could not be sent to Collector till 12th August 1986 and thereafter the DILR had returned all the papers under his letter dated 21st April 1988 to the civil Court and had sought further details as noticed in paragraph-4 supra. The executing Court passed an order dated 5th January 1990 in Regular Darkhast No. 19 of 1984 directing the applicants/decreed holders to supply necessary details. In the said order, time limit of seven days was prescribed for compliance of the order. The executing Court vide its order dated 4th December 1992 dismissed the said Regular Darkhast No. 19 of 1984 for default, since no steps were taken by the applicants/decreed holders to comply with the order dated 5th January 1990. The restoration application seeking restoration of the said Darkhast was also rejected by the executing Court holding it to be barred by limitation.

23. The second Regular Darkhast No. 12 of 1998 filed on 9th March 1998 also came to be dismissed Inter alia holding that the said Darkhast application was barred by limitation prescribed under Article 136 of the Limitation Act, 1963 and that the earlier order dismissing execution application in default operated as res judicata.

24. The narration of facts extracted hereinabove unequivocally demonstrate that the decree in question was preliminary with respect to the lands assessable to revenue, all further proceedings were required to be taken before the Collector or any Gazetted officer subordinate to him, to whom the powers were delegated by the Collector as per Section 54 read with Order 20, Rule 18 of C. P. C. When

matter goes before the Collector, he has to pass final decree by coming to the conclusion, how the land should be partitioned between the parties and then he has to execute the decree actually by putting the parties in possession of the respective portion allotted to them. The civil Court has no say in the matter as to how the land is to be partitioned between the parties, so as to say, for preparing final decree. So, it was obligatory on the part of the civil Court to transfer papers to the Collector for effecting partition as per declaration made in the judgment. All further proceedings with respect to such decree are required to be taken up by and before the Collector. As a matter of fact, it was not necessary for the applicants/decreed holder to move or make any application to the Court to send the decree to the Collector. It was a duty of the Court to send necessary papers to the Collector as per the directions given in the decree itself. An application, even if made in the form of Darkhast application with a prayer to send decree and papers to the Collector, was not an application in execution. It did not attract provisions of Limitation Act. At no point of time executable final decree took birth, so as to attract the provisions of Limitation Act. Therefore, the impugned order passed by the executing Court holding that the execution application was barred by limitation is bad and illegal and suffers from material illegality and irregularity, as such, the same is liable to be quashed and set aside. Issue No. II :

25. Having reached to the above conclusion, the second issue hardly, needs any serious consideration. Suffice it to say that the dismissal of the first execution application, in the above circumstances and for the reasons stated hereinabove, shall not operate as res-judicata. The step taken by the decreed holder just to remind the Court of its duty can hardly be said to be any proceeding attracting provisions of Section 11 of CPC. Thus, the finding recorded by the executing Court, on this count, in the impugned order is unsustainable in the eye of law and the same is also liable to be quashed and set aside.

26. In the result, the order dated 5th May 2000 is quashed and set aside. Regular Darkhast No. 12 of 1998 is restored to file. Considering the old age of the decree, the executing Court is directed to remit the papers in pursuance of Section 54 of CPC to the Collector, Sangli as early as possible, at any rate within two months from the date of receipt of writ of this Court, after completing all the formal but necessary formalities.

GENERAL DIRECTIONS TO ALL THE CIVIL COURTS

By way of general directions, all the civil Courts are directed to remit, to the Collector, within four months from the date of signing the decree u/s 54 of CPC, all the relevant papers for partition of property or a separate possession of undivided estate assessed to the payment of revenue to the Government, without there being any application or request or prayer for the same; so as to follow the mandate of Section 54 of CPC.

Any application seeking direction to send necessary papers to the Collector, should be disposed of within 30 days from the receipt thereof, treating it as an

application filed in the disposed of suit, without opening any independent proceeding in this behalf. Such application should be treated as a request to a Judge or Court to send necessary papers to the Collector for effecting partition u/s 54 of CPC. Such application is really nothing but a request to the Judge or Court to discharge his ministerial duty. In view of this, even no notice to any of the parties to the application is necessary as it is not a petition seeking any adjudication of any of the rights of the parties.

These directions shall also be applicable to all such pending petitions/applications. All such pending petitions/applications must be disposed of as early as possible, at any rate, on or before 31st October 2001, The Registrar, High Court is directed to communicate this order to all the concerned Courts.

These directions would also reduce the congestion of the corridors of the executing Courts wherein number of such applications are registered as regular Darkhasts execution applications and are kept pending for years together for one or the other reasons.

27. Rule is made absolute in terms of the above order with no order as to costs.