

(2003) 01 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 3438 of 1987

Mahadu alias Mahadeo Baji Bhosale

APPELLANT

Vs

Appaji Gunbarao @ Ganpatrao Bhosale since deceased by his
heirs Gangabai Appaji Bhosale and Others

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54

Citation : AIR 2003 Bom 314 : (2003) 1 ALLMR 1158 : (2003) 3 BomCR 15 :
(2003) 2 CivCC 376 : (2003) 2 MhLj 216

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : N.V. Bandiwadekar, for the Appellant; P.G. Shinde, for the
Respondent

Final Decision : Allowed

Judgement

S.A. Bobde, J.—By this petition the defendant/Judgment Debtor challenges the order of the District Court, Ratnagiri dismissing his appeal by which he had made a grievance about the manner in which the Collector had effected the partition after a decree had been passed by the Civil Court.

2. The respondents here i.e. Appaji Gulabrao @ Ganpatrao Bhosale, since deceased, now represented by his legal representatives and others had instituted a Regular Civil Suit No. 50 of 1971 against the petitioner and some others, who are defendants. The parties to the suit were related to each other. The suit resulted in decree to the effect that the suit land should be divided equally between the contesting parties i.e. the plaintiff would be entitled to a half share and the defendants should be entitled to another half.

3. This decree was passed in accordance with the consent terms entered into by the parties. The consent terms referred to the properties in possession of the parties. Clause 5 of the consent terms provided that the partition should be made as far as possible having regard to the present position of the property. It

is this clause which has mainly given rise to the present controversy.

4. The Civil Court sanctioned the compromise and consent decree for execution to the Collector. Before the Collector, the petitioners objected to the manner in which the property was being partitioned. According to the petitioner, it was not necessary to hand-over possession of certain property to the respondents while effecting the partition.

5. These objections were considered in detail by the Collector who observed that partition must be in accordance with the decretal mandate i.e. the property should be divided in half. The Collector also observed that the property has been divided so as not to violate the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. This decision of the Collector was challenged by the petitioner by way of an application u/s 47 of the Civil Procedure Code. This application was heard by the Civil Judge, Junior Division, Khed, who observed that the decree did not contain any specific order that particular part should be given to a particular person. The learned Civil Judge, Junior Division, Khed also observed that the decree referred to the properties which were in the enjoyment of the party and there was no stipulation that a particular property should be retained with that party. The Civil Judge, Junior Division therefore held that the Collector had not contravened the decretal order or transgressed the law relating to partition.

6. The petitioner preferred an appeal against this order before the District Judge, Ratnagiri who dismissed the appeal. The learned District Judge held that no application complaining of the violation of the decretal mandate can be entertained by the Civil Court since the Civil Court becomes functus officio after it sends the decree to the Collector for partition u/s 54 read with Order XX, Rule 18. It is this judgment and order which is challenged in the present petition.

7. Mr. Bandiwadekar, learned Counsel for the petitioner submitted that the learned District Judge committed a serious error of law in holding that a Civil Court has no jurisdiction, that the Civil Court becomes entirely functus officio and cannot consider the question whether the Collector has effected the partition in accordance with the decretal mandate. The learned Counsel further submitted that the learned District judge has wrongly relied on the decision of the Nagpur High Court in the case of Lachhiram Jasram v. Nanba Dhanaji and Ors., reported in AIR 1946 Nag 353.

8. Having heard the learned Counsel for the petitioner, I find that the learned District Judge could not have dismissed the appeal on the ground that the Civil Court becomes functus officio after it sends the decree for partition and cannot in any circumstances consider whether the Collector has effected partition in accordance with the decretal mandate. The reliance by the learned District Judge on the decision in the case of Lachhiram Jasram (supra) is misplaced. In the case before the Nagpur High Court the Applicant had applied u/s 54 and Order XX, Rule 18 of the CPC to the Court for issuing direction to the Collector to the effect

that the partition should be effected in a certain manner, in particular, so as to allot as far as possible entire holdings to the share of the plaintiff. This application has been dismissed. On this fact the High Court took the view that the discretion as to the manner in which the partition is to be held lies wholly with the Collector and the Civil Court is functus officio after it declares the shares of the parties and beyond that it is not concerned with that. The Court observed that in fact the suit terminates so far as the Civil Court is concerned on the passing of the preliminary decree affecting any estate assessed to the payment of revenue to the Crown. These observations were made obviously where anticipatory directions to the Collector were sought to require him to effect partition in a particular manner. This case is not an authority for the proposition that if the Collector has effected partition contrary to the decretal mandate his action is immune from the challenge before a Civil Court. On this question a Division Bench of this Court in Ningappa Balappa and Others Vs. Abashkhan Gouskhan, , observed as follows :--

"5. It is true that it has been held in several cases that the Court is not entirely deprived of controlling the action taken by the Collector. But this control is very limited. It is to be exercised only if the Collector contravenes the decretal order or transgresses the law relating to partition or refused to execute the decree. See the cases cited at p. 228 of Sir Dinshaw Mulla 's Code of Civil Procedure, 12th Edition."

9. Therefore, the learned District Judge could not have dismissed the appeal on the ground that the Civil Court had no jurisdiction to see if the Collector had acted in accordance or contrary to the decretal mandate.

10. In the result, I find it appropriate in the interest of justice to set aside the impugned order and remand the matter back to the learned District Judge for a fresh decision in accordance with the law. The learned District Judge shall decide the issues on merit. It shall, however, be open for the respondents to question the tenability of appeal before the learned District Judge.

11. In the result, the writ petition is allowed within the above directions. The learned District Judge shall decide the matter within a period of three months from the date the party appears before it. The parties are directed to appear before the District Judge on 10th February, 2003. Rule made absolute in the aforesaid terms. There shall be no order as to costs.

12. Office to forward the records and proceedings to the District Judge forthwith.

P. A. to give ordinary copy of this order to the parties concerned.

All Authorities concerned to act on an ordinary copy of this order duly authenticated as true copy by the Sheristedar of this Court.