

(2017) 08 BOM CK 0002
In the Bombay High Court
Case No : 4463 of 2015

Yadav Shivram Timade

APPELLANT

Vs

Ramchandra Shivram Timade, & Ors.

RESPONDENT

Date of Decision : 10-08-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Code of Civil Pro

Citation : (2017) 08 BOM CK 0002

Hon'ble Judges : S. C. Gupte

Bench : SINGLE BENCH

Advocate : V. N. Morande, N. R. Bhishikar

Judgement

1. Heard learned counsel for the parties.
2. Rule. Taken up for hearing forthwith by consent of counsel for the parties.
3. The subject matter of the present petition concerns partition of the suit property between the parties to the suit. The main grievance of the petitioner, who holds 1/4th share in the suit property, is that the Court has straightaway passed a decree for division of the property by metes and bounds after demolishing the house constructed by the petitioner thereon, that is to say, without directing any inquiry contemplated under Rule 18 Sub Rule (2) of Order XX of the Code of Civil Procedure. An application made to the Court by the petitioner for directing an inquiry under Sub Rule (2) of Rule 18 of Order XX was rejected by the Court.
4. The short facts of the case may be noted as follows : The subject matter of the suit is a piece of land bearing plot No.71 and admeasuring 20 x 14 meters and lying or being at Mouza Ankhoda. The plaintiff had constructed a house in a part of this plot and the remaining part of the land was open. It was originally the plaintiff's case that he was the owner of this property and had constructed a

house and allowed his brothers, who are respondent nos.1 to 3 to the present petition, to occupy the house; that sometime later, the permission to occupy the house was withdrawn and possession of the house was demanded by the petitioner. Upon the respondents' refusal to do so, the petitioner filed Regular Civil Suit No.88 of 2017 (new Suit No.102/2008) for possession of the property. The defendants filed written statement and counter claim in the suit. The defendants claimed that the suit land was an ancestral family property of the plaintiff and the defendants and the defendants were entitled to the partition thereof. The suit was decreed by the Civil Judge Junior Division, Chamorshi and the counter claim of the defendants was dismissed. When the matter was carried by the respondents herein in appeal, the Lower Appellate Court by its judgment and decree dated 17th August, 2011 allowed the appeal and dismissed the suit and allowed the counter claim of the defendants, holding each of the parties, namely, the plaintiff (petitioner herein) and defendants (respondent Nos.1 to 3 herein) to be entitled to 1/4th share each in the suit property. The defendants - decree holders, thereafter, filed execution proceeding before Civil Judge Junior Division, Chamorshi being Regular Darkhast No.02 of 2012. In this application, the decree holders sought demolition of the plaintiff's house in the suit property and vacant separate possession of 1/4th share each of the decree holders. The learned Civil Judge Junior Division, Chamorshi, without taking any say of the judgment debtor (plaintiff), allowed the application by issuing a possession warrant. On the same day, another order was passed, directing the Maharashtra State Electricity Board to discontinue electric supply to the house of the plaintiff so as to enable demolition thereof. The plaintiff - judgment debtor, thereafter, moved an application for dismissal of the execution proceedings. It was his case before the executing court that the order of demolition of his house and physical division of the property as vacant land as between the coowners was passed without any further inquiry as contemplated under Sub Rule (2) of Rule 18 of Order XX of the Code of Civil Procedure. This application was rejected by the executing court vide order dated 10th July, 2014. The judgment debtor, thereafter, filed another application purportedly under Order XX Rule 18 of the Code of Civil Procedure and also under Order XXI Rules 99 to 101, etc. of the Code, seeking inter alia an inquiry under Order XX Rule 18(2) and directions for restoration of the electric supply to the judgment debtor's house. The executing court, vide its order dated 25th June, 2015, rejected the application, holding that these issues had already been considered by the court while considering the earlier applications which are referred to above. It is the grievance of petitioner herein that as a result of rejection of his objections, his residential house, which is anyway not the subject matter of the decree, is likely to be demolished. In the premises, the petitioner approaches this Court under Articles 226 and 227 of the Constitution of India.

5. The record of the present case indicates that the decree of partition was passed by the Appeal Court, determining 1/4th share of each of the parties. This decree evidently was a preliminary decree of partition within the meaning of

Order XX Rule 18 of the Code of Civil Procedure. The land in the present case not being assessed to the payment of revenue to the Government, the Court did not have an option to simply declare the rights of the party/parties interested in the property and direct partition to be made by the Commissioner. The Court has been granted, under Order XX Rule 18(2) of the Code, an option to pass a preliminary decree declaring the rights of the several parties interested in the property and giving further directions, as may be required, if it is of the view that partition or separation of shares of the parties cannot be conveniently made without further inquiry. In the present case, there being simply a preliminary decree declaring the rights of the several parties interested in the property, there is no indication of any inquiry by the Court with a view to determine the methodology of partition or separation of shares. If such be the case, it is necessary for the Court to issue further directions with a view to consider physical partition or separation of shares. Particularly in a case like this where the property is constructed upon by one of the cosharers, it was incumbent on the Court to make an inquiry as contemplated under SubRule (2) of Rule 18 of Order XX of the Code of Civil Procedure; such property cannot be conveniently partitioned and shares of the coowner separated without further inquiry. In the present case, without any final decree of partition, without any inquiry as to the modalities of the partition, an application was straightaway moved before the executing court for effecting partition by appointing a Commissioner. The executing court appears to have appointed a Commissioner for effecting the partition and whilst doing so, directed demolition of the house constructed by the plaintiff. This approach particularly denies the plaintiff as a shareholder interested to the extent of at least one moiety in the property to apply for a direction of sale of the property instead of its physical division, as contemplated by Section 2 of the Partition Act, 1893 and thereafter, undertake to buy the share of other shareholder at a valuation.

6. The impugned orders of the executing Court passed on Exhs.24, 25,46 and 65, thus, cannot be sustained. These orders are all on the footing that no inquiry is necessary after passing of a preliminary decree. For the reasons more particularly discussed above, this fundamental basis is clearly flawed and the orders, accordingly, cannot stand.

7. Rule is accordingly made absolute by quashing and setting aside the orders passed by Civil Judge Junior Division, Chamorshi on Exhs.24, 25, 46 and 65 in Regular Darkhast No.02 of 2012 and directing the Court of Civil Judge Junior Division, Chamorshi to hold an inquiry into the matter of modalities of partition, including the convenience of physical partition or separation. At this inquiry, it will be open to any of the parties to apply for sale of the property under Section 2 of the Partition Act, 1893 and thereafter, offer to buy the share of other shareholder at a valuation under Section 3 of the Partition Act, 1893. The petition is disposed of in the above terms.

8. In view of this Court having quashed and set aside the order of the Civil Judge

Junior Division, Chamorshi on Exh.24, the Maharashtra State Electricity Board shall forthwith reinstate the electric supply of the petitioner's house at Plot No.71 at Mouza Ankhoda.