

ORDER PASSED BELOW EXHIBIT NO.185
IN R.D. NO.29/1997

01. By this application, the Judgment Debtor has prayed for recall of an order passed below Exhibit 50 and 51, whereby prayer for depositing consideration amount came to be allowed.

02. The JD has contended that, Arun Chavan has no status of decree holder. The first husband of deceased Kesharbai is living in village Iet. The JD is at liberty to adduce evidence in respect of present execution petition. The R.C.S.No. No. 71/1996 is instituted for the relief of partition. The share will be decided in the R.C.S.No. No. 71/1996. The execution petition and R.C.S.No. No. 71/1996 required to be decided by giving full opportunity to both parties. After the decision of shares on the basis of market value consideration amount required to be proceeded. Under such circumstances permission to decree holder to deposit consideration amount cannot be granted. The said prayer for depositing consideration amount came to be allowed vide Exh. 50 and 51. Therefore, by this application, the JD has prayed for recall of an order dated 31.07.2019 passed below Exhibit 50 and 51.

03. The decree holder has objected instant application by filing his say at Exhibit 188, mainly on the grounds that the instant application is not maintainable and the same is filed prolong the execution petition. There is no provision of recall an order under code of civil procedure, but contention made in the application is

about review of an order. The contention made in instant are false and frivolous. The order passed below Exh. 50 and 51 are legal. The JD has not considered whole proceeding. In the order Exh. 96 Rs. 3000/- costs was imposed on the JD. Thus ultimately, the decree holder has prayed for rejection of the instant application.

04. I have heard the learned advocates for respective parties at length. I also gone through notes of arguments vide Exh.194 through JD.

05. Learned advocate for JD submitted that there is a substance in present application about the review of order passed below Exh. 50 and 51. The present Arun chavan has no status of Decree holder. As per the settled position of law decree and suit for partition may kindly be tried together. The shares of parties are not determined yet which will be determined in R.C.S.No. No. 71/1996.

Learned advocate for JD is relied on,

(a)Nivrutti Vs. Sakhubai, decided on 07.01.2009 In this case Hon'ble justice of Bombay High court, bench at Aurangabad held that, it is well settled that a preferential right, an adopted son would divest his mother of the estate of his adoptive mother of the estate she gets as an heir of her sons who died after the death of her husband. In such a context Nivrutti has to established that the so called exchange of properties was validly done in or about 1960 with mutation entry No.1311.

(b) Ashutosh Chaturvedi Vs. Prano Devi and others decided on 22.04.2008. In this case Hon'ble justice of Supreme Court of India held that In this case Hon'ble Justice of Apex Court held that,

There appears to be another difficulty in the way of the appellants in raising this question. Sub Section (2) of Section 22 of the Hindu Succession Act indicates that a party can enforce a right of pre-emption by making an application to the effect n a Court which has been explained in the Explanation to this Section. If a party intending to take the benefit of the right given under Section 22(1), files an application, the Court has to determine the amount of

consideration for the intended transfer and the party is again given an option to get such a transfer from the co-sharer on such consideration or to refuse the same. If the party declines to purchase the property for the same amount. He has to bear the cost of the proceeding. No such application has ever been filed by any of the parties anywhere. This plea was not even raised in the Court below. It was for the first time in this appeal that the appellants have raised this point. Even in this Court no application has been filed for enforcement of such a right. In these circumstances, the pleas has to be rejected. Therefore, appeal is dismissed.

(c) Ganeshappa Since Dead by His Lrs. Vs. Krishnamma and ors. Decided on 30.06.2004. In this case Hon'ble Justice of Apex Court held that, when the interest in the immovable property devolved by intestate succession upon two or more years specified in Class-I of the schedule then it is between the Class-I heirs inter se they have right of pre-emption. Finally, appeal is dismissed.

(d) Bhola Nath Rastogi and ors. Vs. Santosh Prakash Arya and ors. decided on 18.04.1975. In this case Hon'ble Justice of Apex Court held that, if the party declines to purchase the property for the same amount he has to bear the costs of proceeding. No such application has ever been filed by any of the parties anywhere. This plea was not even raised in the court below. Hence, appeal is dismissed.

(e) Dharma Shamrao Agalawe Vs. Pandurang Miragu Agalawe and ors. decided on 22.02.1988. In this case Hon'ble Justice of Apex Court held that, the joint family properties continued to remained in the hands of Dharma the appellant has joint family properties and that on his adoption Pandurang the first respondent became member of the coparcenary entitled to claim one half of his share in them except those items which had been sold by appellant. Therefore, appeal is dismissed.

(f) Narendra Ray Vs. Kunjabehari Ray and anr. decided on 03.03.1992. In this case Hon'ble Justice of Apex Court held that, this is an petition on the point of preliminary issue on principle of res judicata. The order of lower court is set aside by allowing this petition.

(g) Premlala Nahata Vs. Chandi Prasad Sikaria, 2007 STPL(LE) 37801 SC decided on 02.02.2007. In this case Hon'ble Justice of Apex Court held that, in this case issue as to non-joinder of necessary party and mis-joinder of cause of action. The direction to lower court was given about the disposing of three cases expeditiously.

(h) Chitivalasa Jute Mills Vs. Jaypee Rewa Cement decided on 04.02.2004. In this case Hon'ble Justice of Apex Court held that, the Code of Civil Procedure does not specifically speaks about the consolidation of suit but the same can be done under the inherent powers given by Section 151.

Ld. advocate for JD lastly prayed to allow the application.

06. Learned advocate for Decree holder submitted that there is no substance in application moved by the JD. The JD intentionally prolonging execution of decree by moving application. Present DH waiting for execution of decree for more than 20 years. The all objection of JD decided in present execution petition. JD has not preferred an appeal against decree. Therefore application may kindly be rejected.

07. Considering the arguments of the respective parties, I have minutely gone through the record of the instant case. It is seen that the decree holder has filed application below Exhibit 50 and 51 for permission to deposit consideration amount. However, the said application came to be allowed vide order dated 31.07.2019

observing that executing court cannot go behind decree. The application below Exh. 152 moved for bringing Lrs of deceased Kesharbai on record which came to be allowed on 16.02.2016. From the said order till filing of this application JD has not objected the status of decree holder. The JD has produced on record only hard copies of citation A to H which I discussed supra. The citation discussed supra not applicable to the present case because the application below Exh. 152 moved for bringing Lrs of deceased Kesharbai on record which came to be allowed on 16.02.2016 and by way of this application citation moved. The executing court cannot go behind decree therefore execution petition cannot be tried with suit. It appeared that JD files objection to prolong the execution proceeding. Therefore, costs is required to be imposed on JD. Therefore, by this application, the JD has prayed to recall the said order and prayed to reject the prayer of decree holder below Exh 50 and 51. However, on perusal of the order dated 31.07.2019 passed below Exhibit 50 and 51, I am of the considered view that there is no such mistake or error apparent on the face of record or other reasons, which entitled the judgment debtor to review the said order. So also there is no such provision to move application for recall order even present application moved by the JD. Therefore, the instant application sans merit and liable to be rejected with costs. Hence, I proceed to pass the following order.

-: ORDER :-

Application Exhibit 185 stands rejected with costs of Rs.1000/-(Rs.One thousand only) to decree holder.

Date : 20.11.2019

Sd/-
(K. K. Khomane)
Jt.Civil Judge,J.D. Bhoom.