

Order below Exh.1 in Reg.Darkhast No.26/2007.
Trimbak K.Rajmane V/s. Dattatraya K.Rajmane-8.

1/- After unsuccessful mediation, the matter is taken up for orders on objection at Exh.54.

2/- It would be convenient to have look at the background of the matter. The civil suit bearing R.C.S.No.185/1979 was filed by Trimbak Kashinath Rajmane against four defendants namely Dattatraya, Kashinath, Ishwarappa and Bhimashankar. The suit was for partition and separation of shares out of agricultural land situated at village Pondhawadi, Tal-Karmala and other six house properties situated within the municipal limits of Karmala Municipal Council. The house properties were bearing house properties No.1220,965,2423,1424,1425 and 1426. The suit was decreed whereby the plaintiff Trimbak Rajmane allotted 1/5th share as per the declaration of shares preliminary decree was ordered to be drawn. For the purpose of actual partition and separation, it is ordered to appoint a commissioner. The defendants were given liberty to have their share after payment of necessary court fees.

2/- As per the preliminary decree, the commissioner was appointed. Commissioner Advocate Shri.S.P.Rokade, filed his report in final decree No.1/1994. Final decree application bearing No.1/1994 was filed by decree holder Trimbak Rajmane. The final decree application was disposed of whereby the report of commissioner filed at Exh.62 in F.D.No.1/1994 was accepted and it was directed that the decree holder be given the possession of the properties mentioned in the report of the commissioner within two months. As the possession was not given to the decree holder as per the final decree, the present execution petition has been filed.

4/- J.D.No.2 and 4 filed their say at Exh.21 stating that they have also be given their respective shares as per the preliminary decree an they are ready to pay necessary court fee stamps.

5/- Mean time, J.D., went in appeal against the final decree. By an order dated 10-4-2012 in second appeal No.215/2012 the Hon.Bombay High Court dismissed the second appeal with a further direction that so far as the share of the defendants is concerned, they would be at liberty to approach to executing court for curing difficulty in respect of the court fees. If such

application is made, the concerned court would consider the same on its own merit and in the event the application is allowed, the defendant would be entitled to their shares as per the decree.

6/- Ont his background, the heirs of J.D.No.1 initially approached with an application at Exh.36. They prayed to stop the proceeding of the execution till the decision of the second appeal before the Hon.Bombay High Court. The application was rejected with speaking order. Subsequently, on the next date, the application came to be filed at Exh.40 by the legal heirs of J.D.No.1. It was intimated that the review petition was filed in respect of the second appeal No.215/2012 and that was pending before the Hon.High Court. After giving due opportunity to both the sides, that application came to be rejected by an order dated 5-2-2013.

7/- Subsequently at Exh.48 the legal heirs of J.D.No.1 filed pursis at Exh.48 stating that their 1/5th share be given in their possession after payment of necessary court fees. In further developments by an order dated 22-1-2013, the Hon.Bombay High Court rejected the application for condonation of delay in filing review petition in respect of second appeal No.215/2012.

8/- Prior to that, decree holder filed an application for possession warrant at Exh.32, wherein the say was called on behalf of the judgment debtors.

9/- At Exh.42 as well at Exh.43 the legal heirs of J.D.No.1 filed two types of applications stating that city survey No.2758, 2759, 2760 and 2761 are in their possession and therefore at the time of partition that portion be retained in their possession. They further prayed to appoint City Survey Officer for the purpose of separation of their 1/5th share. They further submitted that they are ready to pay necessary court fee stamps.

10/- Again at Exh.54 the legal heirs of J.D.No.1 filed an objection petition reiterating that the decree obtained by decree holder is fraudulent decree by misrepresenting the Court, the decree has been obtained. It is further contended that due to death of some judgment debtors, there would be change in the shares. It is further provided that the final decree is not engrossed on the necessary stamps. The partition effected by way of final decree is wrongly effected. Advocate should not have been appointed as commissioner. As such, judgment debtors pray for stay to the further execution and to frame necessary issues as

regards the execution of the decree.

11/- Decree holder filed say to the application at Exh.57. It is contended that the application filed at Exh.54 is false in nature. Already second appeal has been disposed of by the Hon.Bombay High Court. The judgment debtors are not at liberty to say anything in respect of the nature of the decree.

12/- As such, decree holder prays for rejection of the application at Exh.54.

13/- Heard for both the sides in length.

14/- I have gone through the provisions in Sec.47 of the Code of Civil Procedure, as well as relevant provisions in order-29 of C.P.C. The question raised by the legal heirs of J.D.No.1 are relating to executability of the decree. In view of the provisions in Sec.47 of C.P.C., the question has to be determined by the Court executing decree and not by the separate suit. As such, I proceed to frame necessary issues in view of the provisions in Sec.47 of the C.P.C., as follows,

Issues.

- 1). Whether the final decree was required by law to be engrossed upon the necessary stamps ? If yes, what would be effect of non-engrossing of decree on necessary stamps ?

- 2). Whether the death of legal heirs of Judgment debtors affect executability of the decree ? If yes, in what manner ?
- 3). Is the decree in question executable in the eye of law ?
- 4). What order ?

(S. V. Jadhav)
Civil Judge, J.D.,
Karmala.

Dt.25-6-2013.