

Received on :- 24-10-2007,  
Registered on :- 24-10-2007,  
Decided on :- 07-10-2014,  
Duration :- Y. M. D.  
08 11 13

IN THE COURT OF CIVIL JUDGE, J.D., KARMALA, DISTRICT –  
SOLAPUR.

( Presided over by P.V.Bulbule.)

Reg.Dar.No.26/2007,  
Exh.No.101.

Trimbak Kashinath Rajamane,  
Age-67 Years, Occu-Nil,  
R/o.Karmala, Tal-Karmala,  
Dist-Solapur.

}  
Decree  
Holder.

V/s.

- (1). Dattatraya Kashinath Rajamane (dead),  
= Legal Heirs =  
A). Anjay Dattatraya Rajmane, Age-40,  
B). Sudhir Dattatraya Rajmane, Age-45,  
C). Smt.Prabhawati Dattatraya Rajmane, Age-68,  
All R/o.Rashinpeth, Karmala, Tal-Karmala,  
D). Sou.Gurudevi Someshwar Nandi, Age-  
R/o.Kadadi chawl, Near Railway line, Solapur.  
(2). Ishwarappa Kashinath Rajmane, Age-71,  
R/o.Rashinpeth, Karmala, Tal-Karmala,  
(3). Smt.Mangal Bhimashankar Rajmane, Age-63,  
(4) Sangita Bhimashankar Rajmane, Age-40,  
Both R/o.Rashinpeth, Karmala, Tal-Karmala.

}  
Judgement  
Debtors.

Advocate for Decree Holder :- Shri.R.A.Barade.

Advocate for Judgment Debtors :- Shri.R.M.Bugade.

Claim :- Application Exh.54 objection petition under  
Order-21, rule-91,101, rule-23 of C.P.C.

J U D G M E N T  
( Decided on 07-10-2014.)

The judgment debtors have filed an application below Exh.54 under order-21, rule-97, 101 and rule-23 of the Code of Civil Procedure.

2/- They have stated that in between the preliminary decree and final decree some parties died. Therefore shares of the parties are changed. The decree holder has not got the final decree engrossed on the stamp papers. Therefore, it is not executable. According to them, the decree is obtained by misrepresentation and fraudulent. One defendant Kashinath died. Kashinath died intestate. Therefore, the final decree is required to be changed. Likewise, the map and record of city survey is available, but the court commissioner has not utilized the document. The decree holder has not given Municipal numbers. The court commissioner has not carried out the measurement in proper manner and committed mistakes. Therefore, the report of the court commissioner is not proper one and accordingly the decree is also not executable. Hence, they pray that the decree holder should apply for change in final decree or in alternative they be permitted to file the application.

3/- The decree holder filed reply at Exh.57 and opposed objection. J.D./defendants have preferred an appeal against R.C.S.No.185/1981, and F.D.No.1/1994 to Solapur District Court and thereafter to Hon. High Court. Therefore, the application is barred under Sec.11 of the Code of Civil Procedure. The appeal is

dismissed. According to the decree holder, Kashinath died prior to filing of Darkhast and his share can be distributed equally in his four sons. The share of the decree holder is also increased. The appointment of court commissioner is proper one. Notice under order-21, rule-22 of Code of Civil Procedure was served to the objector, but they have filed this objection at late stage. The suit property can be identified and there is no any obstruction to identify the property. The decree holder prayed for rejecting the objection.

4/- My learned predecessor passed order below Exh.1 and framed following issues. I have recorded my findings thereon followed by the reasons.

<u>Points.</u>	<u>Findings.</u>
1). Whether final decree was required by law to be engrossed upon necessary stamp ? If yes, what would be effect of non-engrossing of the decree on necessary stamps?	.... Yes
2). Whether death of legal heir of J.D., affect executability of the decree ? If yes, in what manner ?	.... Yes
3). Is the decree in question is executable in the eye of law ?	... No
4). What order ?	... The decree is not executable.

#### REASONS

5/- The decree holder has adduced evidence of general power of attorney holder Trimbak Kashinath Rajmane as PW 1 at exhibit no. 77.

6/- The objectors have examined Sanjay Dattatraya Rajmane as DW 1 at exhibit no. 86.

As to Issue no. 1:-

7/- The objectors raised the objection that the final decree is required to be engrossed on stamp papers. The objectors relied on Smt Surat Bai Versus Radha Kishan, reported in 1977 RLW 522 of Hon'ble Rajesthan High Court. In Para no. 6 of the Judgment it has been held that the final decree for partition should be engrossed on a non-judicial stamp under Article 45 of the Rajesthan Stamp Act, because it is an instrument of partition within the meaning of section 2 (15) of the Act. In some of these cases, the High Court have even gone to the extent of lying down that unless final decree for partition is engrossed on a non-judicial stamp in accordance with the provisions of the stamp Act, there is no decree in existence at all. Other High Courts have taken the view that such an unstamped decree cannot be acted upon.

8/- After going through the above citation it seems that the provision is made in the Rajesthan Stamp Act. So I have to see the synonymous provision in the Bombay Stamp Act. Section 2 (m) of the Bombay Stamp Act defines "instrument of partition".

It says that any instrument where by co-owner of any property divide or agree to divide such property in severalty and includes-

i) a final order for affecting a partition passed by any revenue authority or any Civil Court.

Article 46 of the Bombay Stamp Act prescribed stamp duty on final decree of partition. From above both the provision it is as clear

as crystal that the final decree for partition is the instrument and required to be engrossed on stamp papers. Section 34 of the Bombay Stamp Act says that instruments not duly stamped in admissible in evidence, etc. It says that if the stamp duty is not paid it cannot be acted upon. Hence it is clear that present final decree is not engrossed on stamp papers and it is not instrument within meaning of the Act. It is not acted upon until stamp duty is paid. It is suffice to say that the present final decree is not enforceable until engrossed on stamp papers. In view of above my findings I am inclined to answer issue no. 1 in the affirmative.

As to Issue no. 2:-

9/- I have perused the oral evidence of both the parties. The objectors have raised the objection that due to death of some judgment debtors, there would be change in the shares. The appointment of an advocate as commissioner for preparation of final decree is wrong and the commissioner committed mistakes.

10/- There is no dispute that after passing preliminary decree Judgment debtor no. 1 Kashinath died on 9-10-1990. His 3 daughters and 4 sons brought on record. The Hindu Succession Act is amended in the year 2005 and the daughters become the coparcener, will get share equal to the son. The application for final decree is continuation of the suit. The objector relied on

S. Narayana Reddy and others Versus S. Sai Reddy, reported in AIR 1990 AP 263. In the Para no. 19 of the judgment it is held that in a partition suit, the rights can be considered at any stage till the passing of the final decree. Till the final decree as stated above is

passed in a partition suit, it is well settled that the suit is said to be pending, till final decree is signed by the Judge after engrossing the same on the stamps. In view of the insertion of Section 29 A in the Hindu Succession Act, conferred a right on the daughters. The Hon'ble court gives the rights to the daughters.

Ganduri Koteshwaramma and another Versus Chakiri Yanadi and another, reported in 2012 (1) Mh.L.J. 613. It is held after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the Court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.

Phoolchand and another Versus Gopal Lal, reported in AIR 1967 SC 1470. It is also held that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after preliminary decree some parties die and shares of other parties are thereby augmented.

11/- In the present matter judgment debtor no. 1 died. The final decree is not engrossed on the stamps. The final decree is not prepared as per law and it is not signed by the Judge. In the eye of law it is not complete decree . Hence it is affected on the executability. In view of this legal position I am inclined to answer issue no. 2 also in the affirmative.

As to Issue no. 3:-

12/- In view of my findings to issue no. 1 and 2 the final

decree is not engrossed on stamps and it is not instrument. So it not complete final decree. In such situation death of judgment debtors will affect the executability. Therefore, in the present form the decree is not executable. The execution of the present form of decree is not proper. The decree holder has no any bad intention to harass the judgment debtors. Therefore there is no need to impose costs on the decree holder. Hence I answer issue no. 3 in the negative and pass following order.

ORDER

1. The objection is allowed.
2. Regular Darkhast no. 26/2007 stands closed.
3. The decree holder is directed to again apply for change in final decree and in case of his failure the judgment debtors can apply for final decree.
4. No order as to costs.

Dated 7-10-2014

P. V. Bulbule  
Civil Judge Jr. Dn.  
Karmala.