

R.D.No.04/04**COMMON ORDER BELOW EXH.149,150**
(Dated:31.08.2017)

Decree Holder (DH for short) by way of application Exh.149 is seeking to frame additional issues and by application Exh.150 craves to call the record of original suit bearing RCS No.53 of 1999.

Factual Backdrop:

02 The suit bearing RCS No.53 of 1999 was instituted claiming relief of partition and separate possession. The suit got decreed on 11.11.03 against all eight defendants. Being aggrieved, the defendants i.e. Judgment Debtors (Jds for short) preferred an appeal before the Hon'ble District Court Akola and Hon'ble High Court Bombay. The judgment of this court is conformed by both the Hon'ble appellate courts. Amidst, the DH has filed the present execution of proceeding. For effecting partition of the landed property decree was to Collector Washim. The Tahsildar, Risod filed his report vide Exh.72, 128 and informed the court that there is difference in the area referred to in the decree and the area as per 7/12 extract. Accordingly, the Tahsildar Risod requested for modification the in the decree or Order. Keeping in mind the correction sought by the Tahsildar, the DH had filed Misc. Judicial Application No.10 of 2010 seeking to amend the plaint and decree under section 152 read with section 151 of Civil Procedure Code. This court vide Order dated 09.11.2011

rejected the MJC bearing No.10 of 2010. Being aggrieved, the DH had filed the Civil Writ Petition bearing No.317 of 2012 before the Hon'ble High Court. The Hon'ble High court observed that the application is beyond the scope of section 152 of Code of Civil Procedure and thereby dismissed the writ petition. Thereafter, an application vide Exh.92 is filed by DH in this court under section 152, 153-A, 47 and under order VII rule 3, Order XX rule 3 of Code of Civil Procedure. By way of application Exh.92, the DH prayed correction in the decree to the extent of area of suit land as per revenue record or in the alternative he also prayed that exact area of suit land be ascertained. Application Exh.92 is resisted by JD by filing say Exh.95. During further course, the DH had filed application Exh.96 praying to frame issues for disposal of application Exh.92 and also sought permission to lead oral and documentary evidence. This application was contested as well and vide order dated 07.01.2015 preliminary issue was regarding maintainability of the application Exh.92 is framed. To arrive at conclusion DH lead evidence of in all three witnesses. Pending determination of that issue and application Exh.92 the present applications are filed.

03 Heard learned advocate Mr.S.D.Deshmukh for DH and Mr.S.N.Shette the learned advocate for JD No.01 to 05 and 07. Perused the record.

04 The learned advocate for DH has submitted that the application vide Exh.92 was filed on the strength of section 47 of Code of Civil Procedure. Therefore, according to him an

issue whether the correction sought by the DH is a question relating to execution, discharge or satisfaction of the decree be framed. He went on that for determination of the application Exh.92 framing of that particular issue and leading evidence is necessary. He also urged that for determination of the entire dispute, the original record of RCS bearing No.53/09 has to be called. To the contrary, the learned advocate for JD no.01 to 05 and 07 has submitted that DH has no locus to file application under section 152 of Code of Civil Procedure once his similar application is decided by this court and the order is maintained by the Hon'ble High court. According to him, though the only issue is framed regarding maintainability of the suit, the DH tendered entire evidence in view of section 47 of Code of Civil Procedure as well. He further submitted that this execution proceeding has already abated against the JD no.01 as DH has not taken his legal representatives on record despite having sufficient knowledge. Hence, he prayed that the application be rejected. In rebuttal the learned advocate for the DH again submitted that the Code of Civil Procedure does not contain any provision by which the legal representative of DH can be taken on record. He submitted that the provisions under Order 22 of Code of Civil Procedure pertain to suit only and are not applicable to execution proceeding.

05 It is not in dispute that JD no.1 has died on 06.02.2008, the record is amply evident that DH has knowledge of this fact. In MJC No.10 of 2010 he had taken

the legal representative of JD no.01 on record. It is settled in the eyes of law that appeal and execution is continuation of the suit. Therefore, provisions relating to suit are applicable even to execution proceedings. In this view of the matter, I do not find any force in the submission of JD that there is no enabling provision in execution to take L.Rs. of JD on record. At this stage it is limpid that L.Rs of J.D no.01 are not taken on record since many years. Therefore, I observe that this execution proceeding against JD no.01 has already stood abated.

06 Application Exh.149 pertains to framing addition issue. Neither application nor submission of DH depict that what additional evidence he wants to lead. I have gone through the entire record, it is indeed true that application Exh.92 has filed on the strength of section 47 of Code of Civil Procedure as well. This court vide order Exh.96 had framed the issue regarding maintainability of entire application Exh.92. The preliminary issue is read as under,

Whether application filed by applicant under section 152, 153-A, 47, Order VII Rule 3 and Order XX Rule 3 of Code of Civil Procedure is barred by any law for the time being in force.

07 Therefore, the preliminary issue vide Exh.104 is not restricted for section 152 of Code of Civil Procedure only. The DH was allowed thereby to lead his evidence under section 47 and other related provisions as well. Accordingly,

he has led the evidence. Therefore, at this juncture framing of addition issue is not at all necessary in my opinion. So also, the record is evident of everything. For determination of application Exh.92 nothing appears missing to call the record of original suit bearing RCS No.53 of 1999. Therefore, I hold that the application Exh.149 and 150 are devoid of merits and there purpose already been accomplished by way of an order below Exh.96. Hence, I am convinced to pass the following order.

ORDER

Application Exh.149 and 150 are disposed off as rejected.

Dated:31.08.2017

(P.P.Giri)
Civil Judge(J.D.),Risod