

**R.D. No. 04 of 2004**  
**Uttamrao V/s Sahebrao & Ors.**  
**CNR NO. MHWS080004392004**

**ORDER BELOW EXH. 92**

The decree holder (DH for short) by way of present application craves that the area of suit land as shown in the decree be corrected as per revenue records or in the alternative, exact area of the suit land be ascertained in view of the report of revenue authorities. The application is styled as under section 152, 47, Order VII Rule 3 and Order XX Rule 3 of Civil Procedure Code (CPC).

**Shorn of unnecessary details the facts leading to this application are-**

**02** The suit bearing RCS No. 53/1999 was instituted claiming relief of partition and separate possession. It got partly decreed on 11/11/2003 against in all eight defendants. The present DH is in fact the original defendant no. 02 in RCS No. 53/1999, wherein he had filed consenting written statement. Being aggrieved, other defendants i.e. judgment debtors (JDs) preferred appeal before the Hon'ble District Court vide RCA No. 207/2003 and before the Hon'ble High Court of Bombay vide Second Appeal no. 238/2005. Both the Hon'ble appellate courts confirmed the judgment of trial court. Amidst, the DH has filed the present execution proceeding. The record reveals that this court had sent the decree to the collector for effecting partition of the landed property under section 54 of CPC. The Tahsildar,

Risod filed his report vide Exh-128 and informed the court that there is difference in the area referred to in the decree and the area as per revenue records so far as survey nos. 60/1, 7/2, 147, 102/2 and 117/1 are concerned. It is further informed that in above survey numbers, persons other than parties to this execution proceeding are also in possession of their lands. The revenue authorities thereby sought the correction of area and orders regarding other persons in possession for effecting partition. Hence, this application.

**03** The JD's have contested this application by filing their say Exh-95. According to them, keeping in mind the corrections sought by the revenue authorities, the DH had filed a MJC bearing No. 10/2010 seeking to amend the plaint and decree under section 152 read with section 151 of CPC. This court vide order dated 09/11/2011 rejected the MJC bearing No.10/2010. Being aggrieved, the DH had filed a Civil Writ Petition bearing No. 317/2012 before the Hon'ble High Court. The Hon'ble High Court observed that the MJC No. 10/2010 is beyond the scope of section 152 of CPC and thereby dismissed the writ petition. Instead of approaching Hon'ble Apex Court, the DH has filed present application by suppressing material facts. Therefore, in view of the decision of Hon'ble High Court in Writ Petition No. 317/2012, the present application is barred under section 11 of CPC. The present application is further assailed by saying that section 47 and other provisions are not applicable to the facts of present case.

**04** After perusing JD's say Exh-95, the DH filed a pursis vide Exh-105 and informed the court for the first time about rejection of MJC bearing No. 10/2010 filed under section 152 of CPC and the confirmation of that order by the Hon'ble High Court in writ Petition. His pursis Exh-105 further informed this court that he is therefore not pressing the present application under provisions of section 152 of CPC and only intends to emphasis on section 47 and other provisions. For disposal of the present application, the DH wanted this court to frame issues and to give him opportunity of leading oral and documentary evidence. Therefore, he had filed an application Exh-96 asking those reliefs. My learned predecessor vide order dated 07/01/2015 allowed that application. A preliminary issue regarding maintainability of the present application was framed vide Exh-104 and all the parties were given liberty to lead evidence if any. Thereafter, the DH went on examining in all three witnesses whereas JDs have not adduced any oral or documentary evidence. In this entire backdrop, the present situation in the case in hand is that for disposal of present application issues vide Exh-104 are framed and the evidence is also laid in their support.

**05** Heard Mr. S.D. Deshmukh, the learned Advocate for DH /applicant, Mrs. N.B. Bharad, the learned Advocate for JD No. 02, 04, 05 and 07 and Mr. S.N. Shete, the learned Advocate for JD No. 03. The issues framed at Exh-104 for decision of the present application along-with my findings and reasons therefore are as under-

Sr. No.	Issues	Findings
01	Whether application filed by applicant u/s 152,153(A),47 and Order VII Rule 3 and Order XX Rule 3 of CPC is barred by any law for the time being in force ?	Application is not barred u/s 47 of CPC.
02	What order ?	As per final order.

06 The DH in order to maintain this application, adduced his oral evidence vide Exh-109. He also examined circle inspector vide Exh-127 and the then Talathi vide Exh-133. He further relied on partition maps prepared by circle inspector vide Exh-134 to 139 and a table showing proposed shares in the suit lands vide Exh-140. On the other hand, JD nos. 02, 03, 04, 05 and 07 have informed vide Pursis Exh-142 and 155 that the aforesaid issue being legal, no evidence needs to be given from their side.

#### SUBMISSIONS

07 The learned Advocate for the applicant submitted that in plaint, inadvertently the area of the suit lands was mentioned as 'Full'. The correction of the area or the ascertainment of the exact area are the questions relating to execution, discharge and satisfaction of the decree as envisaged u/s 47 of CPC. There cannot be a total bar for modification or amendment in the preliminary decree if the situation so demands. He also submitted that the application should not be rejected on mere technical grounds. The written statements of the defendants vide Exh-18 and 29 in the original suit show

admissions regarding area of the suit lands. The area admitted in the written statements and the area shown by revenue authorities is same. In support of this contention, he also filed a chart. It is lastly submitted that he is not pressing this application u/s 152 of CPC as the Hon'ble High Court has already rejected the Writ Petition bearing No. 317/2012 by holding that the correction of the area is beyond the scope of section 152 of CPC. Therefore, he craved that his application be allowed and the area of the suit lands be corrected as per revenue records. In support of his contentions, he pressed into service following judgments.

1. *Pratibha Singh and another V/s Shanti Devi Prasad AIR 2003 SC 643*
2. *Vidhyadhar V/s Manikrao AIR 1999 SC 1441*
3. *Shashikant Vasudev Mahale V/s Madhukar Vasudev Mahale 2010 (3) Mh.L.J. 494*
4. *Ganduri Koteshwaramma and another V/s Chakiri Yanadi and another 2012(1) Mh.L.J. 613*
5. *Sau Mandabai Ashokrao Tingne V/s Mohammad Muntajim 2012(2) Mh.L.J. 866*

**08** Mrs. N.B. Bharad, the learned Advocate for JD Nos. 02, 04, 05 and 07 submitted that the present application and affidavit is filed by Naiabrao (Original plaintiff) whereas the evidence in its support is adduced by DH (original defendant no. 02) which is impermissible. This application is only coloured u/s 47 of CPC however in actual the remedy u/s 152 of CPC is

sought. In MJC bearing No. 10/2010 and in Writ Petition bearing No. 317/2012 it is observed that there is no accidental slip or omission. However, the relief u/s 47 is sought on the same ground that the error is caused due to accidental slip or omission. It is also submitted that the book is same only its cover is changed. There cannot be correction in the decree by resorting to section 47 of CPC. The present application also shows that the filing of MJC bearing no. 10/2010 and the order of Hon'ble High Court in Writ Petition No. 317/2012 is suppressed by the applicant. Therefore, he is not entitled to the relief sought.

09 Mr. S.N. Shete the learned Advocate for JD no. 03 has urged that in original written statement defendants have clearly stated that the description of the suit land is incorrect. Therefore, in suit, in First Appeal bearing RCA no. 27/2003 and in Second Appeal bearing No. 238/2005, the DH had every opportunity to get the description corrected. Since the very beginning of the suit, the DH was aware that the description of the suit land is incorrect. Therefore, he had all the time to get the suit amended. There is vast difference in the area of the suit land as communicated by the Tahsildar. This cannot be corrected with the help of section 47 and other provisions of CPC. In support of this contention, the ld. advocate has taken reference to *Lekh Raj (D) Thr. L.Rs. and Ors V/s Ranjit Singh and Ors 2018 All SCR 188*. With this, he prayed that the application be rejected.

### REASONS

10 The scope of section 152 of CPC is very limited as it operates to cure only clerical or arithmetical mistakes arising from accidental slip or omission. It is also true that the error caused in the court record regarding area of the suit lands is not an accidental slip or omission. Thus, with the judgment of Hon'ble High Court in W.P. No. 317/2012, it is no more *res integra* that the correction of the area as sought by the applicant is beyond the scope of section 152 of CPC. However, the scope of section 47 of CPC is very wide in comparison with section 152. The very object of section 47 of CPC is to prevent another suit concerning the decree under execution. Thus, all questions relating to execution, discharge and satisfaction of the decree are to be decided only by the executing court. The first fact in issue in the present application is whether the correction of area is a question which falls in the scope of section 47 of CPC.

11 In *Pratibha Singh supra*, though the facts were different, the Hon'ble Apex Court has held that when a suit as to immovable property has been decreed and the property is not definitely identified, the defects in the court record caused by overlooking the provisions in Order VII Rule 3 and Order XX Rule 3 of CPC are capable of being cured. After all, a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to section 152 or section 47 of CPC depending on the facts of each case. The Hon'ble Apex Court further held that the exact description of the decretal property may be ascertained by

the executing court as a question relating to execution, discharge or satisfaction of the decree within the meaning of section 47 of CPC.

12 Against these observations, the ld. Advocate for JD no. 03 has put emphasis on *Lekh Raj* supra wherein it is held that the factual objections could be raised only in suit in its trial and not in execution proceeding. However, in *Lekh Raj* supra, the appeal was preferred by Judgment Debtors and the objections as to facts were raised therein for the first time. In the case in hand, it is limpid that the defendants had raised objections regarding description of the suit property in the written statements itself. It was for the trial court thereafter to get the objections removed from the plaintiff. Therefore, the law in *Lekh Raj* supra cannot be made applicable to decide the present application.

13 It is trite that the executing court cannot be go behind decree even while deciding any question u/s 47 of CPC. Therefore, in the case in hand, what will amount to going behind the decree has to be carved out. The decree which is put in execution in the present execution proceeding is based on a finding of trial court that the property mentioned in para 2-A, 2-B and 2-C of the plaint is the joint family property of the original plaintiff and defendants. As stated herein-before, this finding has been confirmed by the Hon'ble Appellate Courts in First and Second Appeal. Now, if the executing court does not treat this property as the joint family property of parties, it will certainly

amount to going behind the decree. Similarly, if the executing court makes changes in the shares of the parties as are declared by the trial court, the same will also amount to going behind or beyond the decree. However, the correction of the area cannot be said to be going behind the decree.

14 Indisputably, it was the duty of original plaintiff to institute the suit only after compliance with the provisions of Order VII Rule 3 of CPC. He should have pleaded the exact area of the suit lands and its other description. Upon his failure, it was certainly the duty of the trial court to get the defect cured before passing preliminary decree. However, it is settled that the act of the court should harm no one. For correction of the area no separate suit is required when there is uniform finding that the suit property is the joint family property of plaintiff and defendants. Thus, keeping in mind the observations in *Pratibha Singh* supra, this court is of the opinion that in present situation, the ascertainment of the exact area of some survey numbers and its correction thereafter is a question relating to execution, discharge and satisfaction of the decree within the meaning of section 47 of CPC.

15 Having observed the necessity of the ascertainment of the exact area of the suit property, the only fact in issue remains is what is the exact area of the suit property to be partitioned. Before going ahead, this court intends to refer different description of the suit lands in different documents such as:

Sr. No	Field Survey Nos.	Area as per plaint and decree	Area as per report of Tahsildar	Area as per written statements
1	60/1	4 H. 92 R	Total area 4 H. 5 R- out of which 1 H. 1 R is in the name of Dnyaneshwar Thorat	10 Acres i.e. 04 H.
2	7/2	7 H. 36 R	Total area 7 H 36 R. But only 1 H 1 R is the share of defendant no. 08 Vishnu.	2 Acres 20 R i.e. 1 H.
3	147	13 H. 90 R	Total area 14 H. 79 R. out of which 4 H. 2 R is share of defendants - defendant no. 3 sold 1 H. 34 R in 2003-04.	Defendant no. 01- 3 Acres 13 R, Defendant no. 04- 3 Acres 13 R, defendant no. 03- 3 Acres 14 R i.e. 10 Acres in total.
4	102/2	3 H. 74 R	Total area 3 H. 74 R. -Out of which 4 H 56 R share of defendants.	Defendant No. 01 - 2 Acre 2 R, Defendant No. 03- 2 Acre 2 R and Defendant No. 04- 2 Acre 2 R.
5	117/1	10 H. 73 R	Total area 10 H. 90 R out of which 6 H. 3 R is the share of defendants.	14 Acre 15 R in the name of defendant no. 01, 03 and 04.

vast difference in the area of the disputed lands. The only thing which is vivid and clear enough is that in every disputed survey number the parties have some land which is recognized by the courts as their joint family property. The ascertainment of this area has become the task of this court now. In order to see how much land the parties had in every disputed survey number as their joint family property, this court perused the entire record of the original suit. Some mutations do not show the area of the land and in other ones the area is mentioned but it is not legible. So is the case with crop statements which are very old in comparison to the year in which the suit was instituted. The index-II copies also do not give any clear picture about the description of the lands. This court could not find a single 7/12 extract showing the exact area held by the parties when the suit was decreed. In the circumstance, this court is unable to ascertain the exact area of the joint family property of the parties in the aforesaid survey numbers.

17 This apart, in original suit, an issue as to non-joinder of the parties was framed. The trial court decided that issue in negative and held that the non-joinder of the persons who are pleaded to be in possession of the land is not bad to the suit. Therefore, the partition of the entire land in the disputed survey numbers was ordered. However, by this time, the executing court is clear enough that the entire land falling in aforesaid survey numbers was not the joint family property of the parties. Therefore, the decree cannot be made binding to other persons

who were in possession of their lands in the disputed survey numbers at the time of suit. On the other hand, the decree is binding on the persons who were possession of the joint family property of the parties. Even by this time, the report of Tahsildar shows that other people are also in possession of the lands in the disputed survey numbers. Therefore, the executing court has to see whether the people who are in possession of the land by this time were in possession when the suit was instituted and if so, whether they were in possession of their own lands or the land which is the joint family property of the parties. It may happen that the persons in possession of the land at present may have got it by purchase or inheritance or otherwise from the persons who were in possession of the land at the time of institution of the suit. Therefore, on whom the decree can be made binding is also a necessary question to be decided without which the execution can not proceed further.

**18** The upshot of the entire discussion so far is that the ascertainment of the exact area and thereafter its correction in the decree can be a question relating to execution, discharge and satisfaction of the decree within the meaning of section 47 of CPC. However, despite all efforts, the executing court could not ascertain the exact area of the joint family property of parties. This inability of the executing court is due to absence of necessary, complete and legible documents. Further, the decree cannot be made applicable to all the persons who are in possession of the lands in the disputed survey numbers.

Therefore, the persons on whom the decree is binding and on whom it is not is also necessary to be find out. This also is not possible unless the necessary, relevant and legible documents are present on record. Therefore, in the entire backdrop, issue No. 01 is answered in the negative and in answer to issue no. 02, following order is passed.

**ORDER**

1. The application Exh-92 is partly allowed.
2. The applicant is allowed to correct the exact area of the suit property only after its ascertainment to the satisfaction of the court.
3. For ascertaining the exact area of the suit property and the persons on whom the decree is binding the applicant is directed to produce necessary documents.

Date : 17.09.2019

Sd/-  
(P.P. Giri)  
Civil Judge(J.D.)Risod

**CERTIFICATE**

I affirm that the contents of this P.D.F. File Judgment/Order are same word to word, as per the original Judgment/Order.

Name of the Stenographer	:	P.D. Rudrakshawar
Name of court	:	C.J.J.D.& JMFC;Risod
Date	:	17-09-2019
Judgment/Order signed by the Presiding Officer	:	17-09-2019
Judgment/Order uploaded on	:	17-09-2019