

**ORDER BELOW EXH. 231**

This application is filed behalf DH Uttamrao ( actually i.e LR's of Uttamrao but mentioned DH) for permission to incorporate amendment in plaint and decree and sending a precept u/s. 54 Code of Civil Procedure to the Collector.

2. As per application, the original Decree Holder (in short DH) Uttamrao has filed an application vide Exh. 92 U/s 47, 151, 152 & 153 R/w. Order 7 Rule 3 and Order 20 Rule 3 of CPC.. (actually the application at Exh. 92 is filed J.D No. 08 namely Nayabrao @ Narayan Shankarao Babar, who is plaintiff in original suit, he is no more and his LR's brought on record but mentioned Uttamrao ) The Judgment Debtor (in short JD) have opposed it. Consequently, the original DH also prayed for correction of the area of suit land Survey No. 60/1, 7/2, 147, 102/2 & 117/1 in plaint, decree and also precept as per measurement sheets, revenue record and report of concern Talathi dated 06/02/2010 below Exh. 92 and also prayed for that, the exact area of suit lands survey no. 60/1, 7/2, 147, 102/2 & 117/1 may be ascertained in view of the report of the concern Talathi dated 06/02/2010. Thereafter may be corrected identical with revenue record. It is further averred that, after framing a point, matter is fixed for evidence and after opportunities given to the evidence and hearing of the both sides, the application at Exh. 92 is partly allowed on 17.09.2019. The applicant is allowed to correct the exact area of the suit property only after its ascertainment to the

satisfaction of the court. The applicant is directed to produce necessary documents.

3. It is further averred that, the DH Uttamrao submitted the documents and furnished the evidence by way of affidavit of himself along with concern Talathi and Revenue Inspector as well as original DH Nayabrao (actually Nayabrao is JD No. 8 and original plaintiff) proved the fact stated in the Exh. 92. It is also averred that, however original record of the suit land remains with revenue authority and once precept sent to the revenue authority to ascertain the exact area of the suit lands. On the basis of original record, as such it is the job of revenue authority to ascertain the exact area of the suit land and then effect the equal partition and separate possession of the suit land as per the decree. Once precept sent to the revenue authority is empowered to exact the area of the suit land and thereafter to effect the partition and role of Civil Courts ends. Thereafter, sending the precept to revenue authority and no another application can be entertain by the civil courts. However, number of interim applications disposed off by rejecting the same. Lastly, he prayed for seeking permission to incorporate amendment in plaint and decree in respect of field survey no. 60/1, 7/2, 147, 102/2 & 117/1 in view of Exh. 92 and precept be sent to the collector.

4. Behalf of JD No. 2 and 7 (Bhimrao and Vishanu) is filed say at Exh. 236 and strongly resisted the application and denied averment in it. They contended that, the DH has filed the

same application and JD filed their say. Therefore, the present application is not tenable. DH is not complied the finding of the court in order at Exh. 92. In this order the court made finding that, in suit some mutations do not show the area of land and in other once the area is mentioned the but it is not legible. The index second copies also do not give clear picture about the description of the land. No single 7/12 exact shows the exact area held by the party when the suit was decreed. The entire land was not joint family property of the parties. Moreover, other people is also in the possession of the joint family property. The court gave finding that, this is not possible unless there is necessary, complete, relevant and legible document is there and without complying the same the present application is filed. Further, it is contended that, being aggrieved by the order at Exh. 205, 209 and 220, the present JDs have filed writ petition no. 4005/2022 before the Hon'ble High Court, Bench at Nagpur and in it the interim application is allowed and granted stay as per order dated 18/07/2022 in favour of present JDs. Hence, they lastly prayed to reject it.

5. The JD No. 3 (Shamrao) has filed his say at Exh. 237 and denied all averment in it. He contended that, for correction of judgment and decree, DH had filed application vide MJC No. 10/2010 (Nayabrao + 2 Vs.. Mainabai and others) u/s 151, 152 of CPC. the same is rejected by this court on 09/01/2011 and thereafter, the applicant Nayabrao had filed Writ Petition No. 317/2012 against Mainabai and others before the Hon'ble High

Court of Bombay against the order 09/11/2011 and it was dismissed. This fact is suppressed by the DH. Thereafter, DH Nayabrao (actually he was JD No. 8) has filed application at Exh. 92 and it is partly allowed. In it no were allowed to DH to incorporate the amendment in plaint and decree. Therefore no question is arise to allow the present application.

6. Further he contended that, the JD No.1 (Sahebrao) is died long back but his LR's is not taken on record as well as Taramatibai, Swaraswatibai and Sarubai (JD. No. 4 to 6) died and their LR's not on record which are necessary parties and they are also LR's of late Shankararao and their interest involved in the suit properties. DH is failed to bring LR's of deceased JDs on record. So, application is false, frivolous and liable to be rejected.

7. Behalf of LR's of JD No. 8 the say is filed on overleaf of application and resisted on ground that, it is not tenable at this stage.

8. Heard Ld. advocate for the parties. They argued in the line of their applications and says respectively and relied various rulings of Hon'ble High Court and Apex Court.

9. Perused the application, say thereon and documents on record. Following points arose for consideration to which I have recorded my findings along with reasons.

Sr.No.	POINTS	FINDINGS
1.	Whether the applicant is permitted to incorporate amendment as prayed ? or application is liable to be allowed ?	No
2.	What order ?	Application is rejected

### REASONS

#### As to Points No. 1 to 2 :-

10. It is argued by Ld. advocate Shri S. D. Deshmukh for D.H. that, in the present Darkhast the precept was sent to the Collector for the effecting partition and separate possession in view of the Decree in RCS No. 53/1999. The collector sent the precept to the Tahsildar for the effecting partition and after enquiry the Tahsildar found difference in area of suit property i.e. Judgment, Decree and the 7/12 extract. Therefore, he sent the report to the court and informed that, the land cannot be partitioned unless the correction is carried out in precept. Thereafter, Exh. 92 is filed and it came to be partly allowed. He further argued that, the decree cannot be executed unless there is amendment in the precept and it no prejudice will be caused to the other side, if the amendment carried out. During argument he taken my attention towards the entire proceeding as well as Exh. 92 and revenue records and point out several incidents happened in the proceedings and area mutationed, documents placed on

record. He also submitted that, if correction is not permitted then DH suffered grate loss. So, he prayed to allow application. To support his contention he relied on the rulings of Hon'ble High Court and Supreme Court :-

**10 (a)** The Judgment Hon'ble Supreme Court in Ganduri Koteshwaramma and another Vs.. Chakiri Yanadi and another (Civil Appeal No. 8538 of 2011 (Arising out of SLP (Civil ) No. 9586 of 2010) D.on 12/10/2011, (2012) 1 MH LJ 613 in it observed that, *“Final Decree is always required to be in conformity with preliminary decree, but that does not mean that a preliminary decree, before final decree is passed, cannot be altered or amended or modified by trial Court in the even of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree.”* further it is observed that, *“ Court has always power to revise preliminary decree or pass another preliminary decree if situation in changed circumstances so demand, suit for partition continues after passing or preliminary decree and proceedings in suit get extinguished only on passing of final decree, Right of parties in a partition suit should be settled once for all in that suit alone and no other proceedings.”*

**10 (b)** The Judgment Hon'ble Bombay High Court (Nagpur Bench) in Anandrao Ganpatrao Belkhode and others Vs..Azizul Haq Hazi Abdul Bari Deceased by L.Rs. And other (1997) 1 ALL MR 557 : (1997) 3 MhLJ 419 in it stats that, *“The*

*Civil Court as discussed above was a functus officio after the precept was sent to the Collector for effecting the partition as per the preliminary decree and there was no circumstances which warranted any sort of interference in the act of partition, which was to be completed by the Collector or his subordinate gazetted officer u/s. 54 of the CPC and read with section 85 of the Maharashtra Land Revenue Code and the rules framed thereunder. It was none of the business of the Civil Court to give directions to give a contiguous land from Survey No.s206/1-Kh to the Tahsildar.” Further it is stated that, “Once the Civil Court, being a functus officio, passed a decree in respect of the estate assessed to the land revenue and transmits it to the Collector becomes functus officio, and these orders, therefore, suffer from inherent lack of jurisdiction. Not only that, but it amounts to an illegal usurpation of the jurisdiction by the Civil Court.”*

11. Ld. Advocate N.B. Bharad for JD No. 2 to 7, Shri. Shete behalf of J.D.No.3 argued in the line of their say. As per their argument executing court cannot correct the plaint and decree and he also go beyond the scope of decree. They took my attention towards the order below Exh.92. They further submitted that, the real situations of the suit property is not came on record to ascertain the exact area. There is differences between revenue documents. The persons who are owners are not a party to the present proceeding. The lacuna cannot be fill up. The applicant has failed to point out ascertainment of correct area. Ld. advocate Shri Shete submitted that, the point of

correction already decided by Hon'ble High Court in the Writ petition No. 317/2012 and rejected the prayer of amendment. So, application is liable to to rejected. The application is vague and not tenable.

**12.** Learned advocate Smt. S.V. Ippar behalf of LR.s of JD.No. 8 submitted that, the application to decide on merits.

**13.** As per submission of both sides. I deal with firstly the objection raised on the point of stay of Hon'ble High Court to proceeding. It is argued behalf of JD no. 2 and 7 that, being aggrieved on order at Exh. 205, 209 and 220 the present JD have filed W.P. No. 4005/2022 before Hon'ble High Court and in it stay is granted to the present proceeding in favour of JD. Therefore, present application cannot be decided. It is fact on record that, the interim application 205, 209 and 220 filed by present JD for temporary injunction to restrain to DH and daughter of JD No. 8 from taking forceful possession of suit property i.e. Survey no. 60/1 and 64 till disposal off execution proceeding. These applications is rejected on 06/05/2022 and by aggrieved this order W.P. 317/2012 is filed before Hon'ble High Court. It is pending before Hon'ble High Court. It is not brought to my notice behalf of concern JD in respect of stay to the present execution proceeding. Therefore, the submission of Ld. advocate not is acceptable and I have deal with the present application.

**14.** Further, The ld. advocate behalf of JD No. 2 to 7 submitted during argument that, already the decree was passed

and the executing court cannot go behind the decree so application is not tenable at this stage. To support their contention relied on The Judgment of Hon'ble Supreme Court in Sanwarlal Agrawal Vs. Ashok Kumar Kothari and ors D.On 21 February, 2023 in it observed that “ 15- *This court has time and again cautioned against the Execution Court adopting such an approach. In Topanmal Chotamal Vs. Kundomal Gangaram, 9 a three-judge bench held as follows,*

*It is a well settled principle that a Court executing a decree cannot go behind the decree : if must take the decree as it stands, for the decree is binding and conclusive between the parties to the suit.*

*Yet again, in Meenakshi Saxena (supra) it was reiterated that :*

*The whole purpose of execution proceedings is to enforce the verdict of the court. Executing court while executing the decree is only concerned with the execution part of it but nothing else. The court has to take the judgment in its face value. It is settled law that executing court cannot go beyond the decree. But the difficulty arises when there is ambiguity in the decree with regard to the material aspects. Then it becomes the bounden duty of the court to interpret the decree in the process of giving a true effect to the decree. At that juncture the executing court has to be very cautious in supplementing its interpretation and conscious of the fact that it cannot draw a new decree. The executing court shall strike a fine balance between the two while*

*exercising this jurisdiction in the process of giving effect to the decree.”*

In the present proceeding, the question arises in respect of correction of decree after sending precept to the collector for effecting partition. The executing court while executing the decree deal with execution part of it. But, if decree is ambiguous or any error occurred due to clerical and arithmetical mistake as well as the amendment is necessary for the purpose of determine the real question raised by or defending on the such proceeding. The executing court also determine the question between the parties relating to the executions or discharge and satisfaction of the decree. Considering the nature of the present application and prayer in it I mention here with due respect that, the present ruling is not helpful to the JD in this peculiar circumstances.

15. The ld advocate for DH submitted that, in view of long pendency of proceeding it is need to speedy disposal of it and taken my attention towards the directions issued by Hon'ble Apex Court. He relied upon the Judgment of Rahul S. Shah Vs.. Jinendra Kumar Gandhi & Ors. in it further observed that, “42 - *All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions :-*

1- *In suits relating to delivery of possession, the court must examine the parties to the suit under Order X in relation to third*

2- *party interest and further exercise the power under*

*Order Xi Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.”*

3- -----

*14- The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.*

The Ld advocate relying on this ruling of Hon'ble Apex Court rightly submitted that, dealing with suits and proceedings direction issued by Hon'ble Apex Court mandatorily required the followed by this court. In this judgment the Hon'ble Apex Court in para 42 issued certain guidelines and directions. In this proceeding, number of interim applications have been filed at time to time and appeal and revisions also filed thereon. To deciding the applications at Exh. 92 matter is fixed for evidence and after given opportunities to both sides and it is decided.

**16.** Before proceed further, it is proper to look into record for gather the long journey of proceeding. Initially, the suit was filed before the CJSD, Washim bearing No. Spl. C.S.35/1999 and the matter was transferred before this court and instituted as bearing RCS No. 53/1999 for claiming relief of Partition and Separate Possession by one Nayabrao against his brothers and sisters namely Sahebrao, Uttam, Bhimrao, Shamrao, Taramati, Sarswatibai, Sanubai and son of Bhimrao namely Vishnu. It got partly decreed on 11/11/2003 against in all eight defendants.

The present applicant/DH namely Uttamrao was in fact the original defendant no. 2 in it, wherein he had filed consenting written statement. The suit was decreed. Being aggrieved, other defendants i.e. JD preferred appeal before the Hon'ble District Court, Washim vide R.C.A. 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.

17. The original suit bearing no. 53/1999 was partly decreed and it is ordered that, Suit for partition in respect of movable property as mentioned in para 2(c) of the plaint is rejected. Plaintiff Nayabrao, defendant no. 1 Sahebrao, defendant no. 2 Uttam and defendant no.4 Shamrao shall have 9/48 the share each in the suit property as described in para 2 (A) & (B) of the plaint. Similarly, defendant No.3 Bhimrao and defendant No. 8 Vishnu shall have 9/48<sup>th</sup> share (jointly i.e. 9/96 share ) each in the suit property as described in para no. 2(A) and (B) of the plaint. The defendant 5 Taramati, defendant No. 6 Saraswatibai and defendant no. 7 Sarubai shall have 1/48<sup>th</sup> share each in the suit property as described in para 2(A) & (B) of the plaint. The description of the filed properties in the plaint is as :

Field	S.No.	H.R.	L.R.	Share
1)	60/1	04-92	11-00	Full
2)	64	12-48	34-00	Full with 1 well with full share therein
3)	99	08-92	23-00	Full with 1 well with full share therein

4)	7/2	07-36	17-75	Full
5)	147	13-90	09-52	Full
6)	102/2	03-74	08-45	Full
7)	117/1	10-73	18-00	Full
8)	117/2	01-62	03-00	Full

18. The present execution proceeding i.e. R.D. No. 04/2004 is filed by original defendant no. 2 namely Uttamrao (D.H) against original plaintiffs and other defendants, (JD nos. 1 to 8.) during the pendency of proceeding the DH Uttamrao died and his LR.'s namely Suresh, Dhondu, Ratan, Bhagwan, Satish and Shila are brought on record. The J.D. Nayabrao (Who was original plaintiff) also died and his LR.'s i.e. Anjali, Gajanan, Rajani and Manjusha have been taken on record. It is also seen that, the JD nos. 4 and 5 Taramati and Saraswati (Who was original def. nos. 5 & 6) also died.

19. The record reveals that, this court had send the decree to the collector for effecting partition of the landed property under section 54 of CPC. The Tahsildar, Risod filed his report and informed the court that, there are difference in the area referred to in the decree and area as per revenue records so far as survey nos. 60/1, 7/2, 147, 102/2 &117/1 are concerned. It is further informed that, in above survey number, persons other then parties to this execution proceeding are also in possession of their lands. The revenue authorities sought the correction of area and order regarding in other person in possession for effecting partition.

20. Thereafter, the DH filed an application below Exh.92 for correction of area of the suit land survey nos. 60/1, 7/2, 147, 102/2 and 117/1 (five properties) as shown in the decree and precept be corrected as per measurement sheet, revenue record and report of Talathi dated 06/02/2010 or in the alternatively, exact area of suit land be ascertained in view of the report of the revenue authorities. The application is styled as u/s. 152, 47 Order 7 Rule 3 and Order 20 Rule 3 of the CPC. In this application, issue or point for consideration is as - 1) Whether the application filed by applicant u/s. 152, 153A, 47 and O. 7 Rule 3 and O. 20 R. 3 of the CPC is barred by any law for the time being enforced ? 2) What Order ? The issue no. 1 is answered in negative and in view of issue no. 2 final order is passed. Therefore I have reproduced the order passed by my ld. predecessor at Exh.92 is as :-

### **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.

Dt. 17/02/2019

Civil Judge (J.D.)

21. It is observed in para 18 of the said order that, however, despite all efforts the executing court could not

ascertain the exact area of the joint family property of the parties. This inability of the executing court 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.

**22.** The above said order reflect that, the applicant is allowed to correct the exact area of the suit property only after ascertainment to the satisfaction of the court. It means the ascertainment of exact area is a precondition and after it ascertainment to the satisfaction of the court. It is pertaining to note that, as per this order it is not disclose in which particular survey numbers what or which area be corrected nor the present application it is mentioned. The DH/applicant by way of present application intending to correct in view of the report of the revenue authorities and records. So, it is required to ascertain the exact area with the help of documents produced by DH/applicant or the parties to whom decree is binding. For it the DH filed certain certified documents i.e. 7/12 extract etc. of concern survey numbers with list Exh. 241, 248 and 196 on record.

**23.** Therefore, it is necessary to deal with these documents in view of the prayer in present application (Exh.231) as well as report of Tahsildar dated 06/02/2010 to ascertain the

exact area and the satisfaction of the court. Thereafter, the applicant will allowed to correct the exact area of the suit property. Therefore, it will be useful to mention the relevant report of Tahsildar in respect of description of the suit property.

Sr. No	Field S. Nos.	H.R. (as per decree and plaint)	H.R. (as per revenue record)	Description
1	60/1	4.92	4.05	Found <b>Incorrect</b>
2	64	12.48	12.15	Found correct
3	99	8.92	8.92	Found correct
4	7/2	7.36	1.01	Found <b>Incorrect</b>
5	147	13.90	4.02	Found <b>Incorrect</b>
6	102/2	3.74	4.56	Found <b>Incorrect</b>
7	117/1	10.73	6.03	Found <b>Incorrect</b>
8	117/2	1.62	1.62	Found correct

From the report, it seen the area in respect of Survey nos. 64, 99, 117/2 is found correct and other is incorrect. There is variance in area in Survey nos. 60/1, 7/2, 147, 102/2, 117/1 of the suit property. It is fact on record that, upon these variance and difference the concern Tahsildar forward precept back for the correction to this court.

**24.** My learned predecessor already shows differences in respect of area between plaint and decree, as per tahsildar report and as per written statement in para 15 of the order passed below Exh. 92. Therefore, it is proper to see whether the persons who are in possession of the land at present they were in

possession on the joint family properties of the parties when the suit was instituted as well as to see exact position of the suit properties in respect of area with the help of documents i.e. 7/12 extract etc. It is also required these documents to compared measurement sheet and report of Tahsildar and to see what fact and circumstances be came on record. Ld advocate for D.H. has given much force on these documents during arguments.

**25.** Perusal of measurement sheets ( Exhs. 135 to 139 ) shows divisions of survey number as per decree. It do not show the area of survey numbers.

**26.** I have already mentioned above in respect of Tahsildar report dated 06.02.2010. There are difference in the area of five suit properties i.e. survey/ gut no. 60/1, 7/2, 147, 102/2, 117/1. So, I have discussing the old record of survey/gut numbers in respect of area of lands.

**A) Survey number 60/1 :-**

- a) As per report of Tahsildar the area is 04 H. 05 R. land.
- b) The 7/12 extract (in year 1979-80 to 1988-89) shows that, 4 H. 5 R. land on name of Sahebrao (JD.1), Bhimrao (JD.2), Nayabrao (JD.8), and Santosh Shamrao Babar.
- c) The name of Santosh is appears in the 7/12 extract but he is not party to original suit or present Darkhat. The area on his name is shown 01 H.

- d) Further, the Mutation entry dated 06.03.2004 shows the Sahebrao Shankar Babar had sold out 1 H. 1 R. land to Vishnu Babar (JD.No. 7) on 27.03.2004 in this survey no. 60/1. ( the mutation entry number is not visible )
- e) Further, the copy of Sale-deed dated 16/10/2002 bearing no.1834/2011 shows that, the said Santosh sold out 1 H. 1 R land to Dnyaneshwar Ramchandra Thorat in gut no. 60. (gut no. 60 is not relevant to the suit property, but 7/12 extract attached with sale-deed is gut no. 60/1 )

**B) Survey number 7/2 :-**

- a) As per report of Tahsildar the area is 01 H. 01 R. land.
- b) The 7/12 extract (in year 1979-1980 to 1989-1990) shows that, 1 H. 3 R. land was mutated on the name of Vishnu Bhimrao Babar (JD No. 7).
- c) Here 2 R. land variance in report and 7/12 extract.

**C) Survey number 147 :-**

- a) As per report of Tahsildar the area is 04 H. 02 R. land.
- b) The 7/12 extract (in year 1979-80 to 1992-93) shows that, 04 H. 02 R. land on the name of Sahebrao Bhimrao and Santosh 01 H, 34 R to each.
- c) Further said Santosh is not party to the suit or present

proceeding. It means the area on the name of the persons who are parties to the proceeding is 02 H. 68 R ( Some portion of 7/12 extract is not visible )

- d) Further, the mutation entry no. 1548 shows that, Sahebrao Shankarao Babar sold out his 01 H. 34 R. land to Madhukar Narayan Golhare on 22.03.2001.
- e) Further, the mutation entry number 1932 shows that, Bhimrao Shankarao Babar sold out his 01 H. 34 R. land to Madhukar Narayan Golhare on 23.12.2002.
- f) The mutation entry no. 1933 which is effected on 01.12.2003 shows that Bhimrao Shankarao Babar sold out his 83 R land out of 01 H. 34 R. land to Gajanan Vitthal Shendge on 23.12.2003.
- g) The Mutation entry No. 4215 is effected on 17.09.2011 shows that, one Ahmad Kadar Ahmad Bashir sold out 0 H. 67 R land to Bhagwat Ramkisan Wankhede on 20/07/2011 and the mutation entry no. 4316 shows that, one Shaikh Wahid Sk. Bannu sold out 0 H. 67 R. land to Bhagwat Ramkisan Wankhede on 20.07.2011. (Total 1 H. 34 R.)
- h) As per sale deed dated 21.11.2003 the said Santosh Shamrao Bajad sold out his 01 H, 34 R land to Jagdish Shankarla Kothari as per sale deed bearing No. 2014/03.

- i) Further, the sale deed no. 1412/2010 executed on 26.05.2010 shows that Kiran Bhagwanrao Khirsagar sold out 01 H. 34 R. land to Shaikh Khurshid Shaikh Bannu on 26.05.2010.

**D) Survey number 102/2 :-**

- a) As per report of Tahsildar the area is 04 H. 56 R. land.  
b) The 7/12 extract (in year 1979-80 to 1988-90) shows that, the 0 H. 82 R land was on the name of Bhimrao.  
c) There is near about 3 H. 74 R. difference in land.

**E) Survey number 117/1 :-**

- a) As per report of Tahsildar the area is 06 H. 03 R. land.  
b) The 7/12 extract (in the year 1979-80 to 1993-94) shows that, 05 H. 17 R. land on the name Sahebrao, Bhimrao and Shamyamrao.  
c) There is also difference of near about 86 R. land.

27. I have trying to what fact appeared from the above said documents and position of suit property prior to institution of suit is mentioned in following table :-

Sr. No.	Field Survey Nos.	Area as per plaint and decree	Area as per report of Tahsildar	Area as per old revenue record i.e. 7/12 Extract
1	60/1	4 H. 92 R	Total area 4 H. 5 R. Out of which 1 H. 1	4 H. 5 R. on the name of Sahebrao,

			R is in the name of Dnyaneshwar Thorat	Bhimrao and Santosh. (Santosh was/is not a party to the suit)
2	7/2	7 H. 36 R	Total area 7 H. 36 R But only <b>1 H. 1 R</b> is the share of defendant no. 08 Vishnu	<b>1 H. 3 R.</b> On the name of Vishnu
3	147	13 H. 90 R	Total area 14 H. 79 R. Out of which <b>4 H. 2 R.</b> is share of defs. Def. no. 3 sold 1 H. 34 R. In 2003-04.	<b>4 H. 2 R.</b> But, out of it 1 H. 34 R. On the name of Santosh who are not party to the proceeding, so the area shown on name of family member who are parties is <b>2 H. 78 R.</b> on the name of Sahebrao and Bhimrao
4	102/2	3 H. 74 R	Total area 3 H. 74 R. Out of which <b>4 H. 56 R.</b> Share of defendants.	<b>0 H. 82 R.</b> on the name of Bhimrao
5	117/1	10 H. 73 R	Total area 10 H. 90 R out of which <b>6 H. 3 R.</b> is the share of defendant.	<b>5 H. 17 R.</b> on the name of Shamrao, Bhimrao and Sahebrao.

28. During argument ld. advocate for DH/applicant taken my attention towards the copies of gut no. 102/3 and 102/3 of old 7/12 extract and submitted that, it is possibility the land in gut no. 102/2 in Tahsildar report mentioned with area of land in gut no. 102/3. Therefore, the report shows 4 H. 56 R. land in possession of defendants. Further he submitted that, in gut no. 117/1 apparently 5 H. 17 R. but mistakenly Talathi has mentioned 6 H. 3 R. land in the report. In the light of this submission, perusal of copies of both 7/12 extract it reveals that the total area of gut no. 102 is 3 H. 74 R. land as well as the total area of gut no. 102/3 is also 3 H. 74 R. land. So, the total area of both land is 7 H. 48 R. land, but as per plaint and decree there is only 3 H. 74 R. land is mentioned. Furthermore, in gut no. 102/3 (7/12 extract in year 1980-81 to 2004-05) shows that, the 81 R. land is mutated in the name of Santosh Shamrao Babar and 1 H. 24 R. land on Vishnu Bhimrao Babar and 83 R. land on Sahebrao Babar. Thus, there are 2 H. 87 R. land was possessed behalf of family member in gut no. 102/3. I have already stated that, the Bhimrao has possessed 82 R. land in gut 102/2. Thus, the total area possessed in gut no. 102/2 and 102/3 behalf of family member of DH and JD is 3 H. 69 R. So, thereafter also, there is variance in area. Further, the mutation entry no. 6285 which is effected in the year of 1979 shows that one Vasant Bahekar sold out 82 R. land to Sahebrao Shankar Babar in gut no. 102/03. Important thing is that, from the 7/12 extract it appear that, the gut no. 102/3 was existence prior to filing of suit, but it is not

part of the suit property. Further, the Santosh is also not party to original suit or present proceeding. Therefore, the argument advanced behalf of DH is also no acceptable. Thus, the area referred by revenue authority and old 7/12 extract prior to institution of suit shows there is much ambiguity or variance in the area of the suit properties. Furthermore, as per report of Tahsildar and present revenue record particularly 7/12 extract shows that, in the above survey numbers, persons other than parties to the proceeding are also in possession of their lands.

**29.** The one thing is necessary to mention here in respect of correction area which is admitted by both sides. Meanwhile, after precept sent back to court. the DH had filed M.J.C bearing no.10/2010 seeking to amend the plaint and decree u/s. 152 r/w 151 of C.P.C. it was rejected on 09/11/2011. Being aggrieved by this order, the DH had filed Civil Writ Petition bearing no. 317/2012 before the Hon'ble High Court and it was also dismissed on 19/10/2012. Thereafter, the present application has been filed.

**30.** In the Judgment of Ganduri Koteshwaramma and another Vs.. Chakiri Yanadi and another (Supra), The question arise whether the benefit of Hindu Succession (Amendment ) Act 2005 are available to the appellants. The appellants and respondent are siblings being daughter and sons, the suit for partitions in CJSD against the father, brother and sisters, the trial court passed the preliminary decree 1999. Thereafter the

preliminary decree is amended in 2003. thereafter, in furtherance of preliminary decree the plaintiff filed two application for passing final decree and determination of mesne profits. The trial court appointed commissioner. In the course of consideration of report of commissioner Hindu Succession (Amendment Act, 2005) till into force on 9 sept. 2005 and section 6 was substituted. So, the appellant made application for passing the preliminary decree in their favour into four equal shares and allowed one share to each of them by ments and bounds and delivery of possession. The trial court allowed the application and held that, the appellants were entitled for free allotment of share in the preliminary decree. This order is challenged before Hon'ble High Court and appeal is allowed and set aside order of trial court. Thereafter, present appeal was filed before the appellant court and the appellate court set aside the impugned judgment of the Hon'ble High Court and restored the order of trial court. Thus, in this appeal the issue of entitlement of re-allotment of share in the preliminary decree. The case in hand there is no re-allotment of share but the correction of area is involved so, the fact in present case in hand are different. With due respect I herewith mentioned that, the present ruling is not helpful to the decree holder.

31. In the Judgment of Anandrao Ganpartrao Belkhode and others Vs..Azizul Haq Hazi Abdul Bari Deceased by L.Rs. And other (Supra) the fact is that, the two Decree holder compromised with defendant on accepting the amount to the full

and final satisfaction of their share in the decree and accordingly an application was filed in MJC No. 237/1978 in December 1986 and the order accepting the compromise was passed; wherein, a decree was directed to be amended as per pursis Exh. 53 and the proceedings were proceeded with. It appears that without amending the preliminary decree, however, the amended precept was sent to the Collector on or about 20<sup>th</sup> January, 1987. The second revision application no. 5/1997 has been filed against the order in MJC No. 237/1978 for quashing the execution and possession warrant in Spl. Drk. No. 414/1996 and further claiming the restoration of the land bearing survey no. 135/2 with other prayers and in it, it is directed The collector and his subordinate gazetted officer are hereby directed to effect the partition of the agricultural lands covered in the preliminary decree in special Civil Suit No. 238 of 1973 considering the provisions of Section 85 of the Maharashtra Land Revenue Code and the rules framed thereunder and finalise the same after giving opportunity to the parties to the suit and the applicants and /or any other transferee of the said land.

In this revision application the question involved is to considered the validity of the execution of the preliminary decree of partition or to allotment in the share of Decree Holder. The proceedings were pending before the Tahsildar, as contemplated u/s. 54 of the Civil Procedure Code, still the proposal to allot Gat No. 135/2 was not prepared by the Tahsildar on his own and was not equally fanalised by the Tahsildar independently. The

Tahsildar has proposed to give some other lands i.e. Survey Nos. 48/1 and 47, but the Civil Court issued a direction to issue the specific land and not only that but the Civil Court proceeded to deliver the possession of the said land when the Tahsildar prepared the 7/12 extract as per the direction of the Civil Court. Thus, the act of the partition of the property assessed to the land revenue has been performed by the Civil Court and so also the delivery of possession has been given by the Civil Court. Thus, the fact in present revision application and case in hand are different. With due respect I herewith mention that, the present ruling is not helpful to the decree holder.

**32.** The word 'ascertainment' denotes '*the certainty, or find out exact position or situations.*' or to establish the facts definitely from uncertainty. the facts As referred earlier there is question arise about the ascertainment of area and DH/applicant has not mentioned the exact area of intending or proposed amendment in present application or at Exh. 92. The DH or the party to seek amendment is bound to mention specifically about the proposed amendment of exact area in the application. In the present application there is no exact area in each gut number has been not enumerated in respect of incorporation to proposed amendment. The DH/applicant also not taken pain to ascertainment the area in particular gut number and pleaded in the application.

**33.** Ld. Advocate during the argument on asking quarry in

respect of absence of exact area in the present application, they argued that, the court has sou-moto also ample power to modify, alter or correct decree and plaint in the interest of justice to the parties to get fruits of decree to decree holder, for that purpose he filed certain documents on record to ascertain the exact area and after correction to give permission to incorporate amendment. For this submission I mentioned here that, no doubt the executing court has power to decide all questions relating to execution, discharge and satisfaction of the decree, if situation is demand. In the present case the DH/applicant intending to proposed amendment in view of report of Tahsildar, but as per above discussion it reflect that, there is variance in the revenue record and the report of Tahsildar. The document is insufficient to show clear picture of description of exact area of suit properties. There is ambiguity remain in existence to satisfactions of the court. Thus, the above said discussion the court is unable to ascertain the exact area of the joint family properties of the parties in the aforesaid survey numbers.

**34.** During argument, it is also submitted behalf of DH that, this court also have inherent power to make corrections to ignoring the difference and mistakes in revenue records and to pass order. The provision of u/s. 151 of the code made it clear that, the inherent power are not controlled by the provisions of the code. Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of the justice or to

prevent abuse of the process of the court. but, considering the above discussion the DH or party to whom the decree is binding cannot go away from their responsibilities to assist to find out exact area of the suit property and mention it clearly in application. The clear picture to intending amendment or ascertainment of exact area is not came on the record. In this peculiar circumstances of the case the submission advanced behalf of applicant/ DH is not acceptable. Furthermore, particularly when already the Hon'ble High Court rejected the same prayer in respect of correction.

**35.** In this circumstances it is not proper to allow application. Therefore, I have answered to point no 1 in negative. In this result, in view of point no 2 following order is passed.

### **ORDER**

The application is rejected.

Date:- 08.11.2023.

**Sd/-**  
**(Sharad N. Gavali)**  
Jt. Civil Judge, (J.D.),Risod,

**CERTIFICATE**

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

Name of the Jr Clerk	:	<b>Rohan S. Koshti</b>
Name of court	:	Jt.C.J.J.D.& JMFC, Risod.
Date Of Order	:	08.11.2023
Order signed by the Presiding Officer	:	08.11.2023
<b>Order uploaded on</b>	:	<b>10.11.2023</b>