



COMMON ORDER PASSED BELOW EXH.1 IN R.D. NO.04/2004

(CNR : MHWS08000439-2004)

Uttamrao ..Vrs.. Sahebrao & Ors.

The present execution proceeding is filed by D.H. i.e. original defendant No.2 namely Uttamrao Shankar Babar for execution of decree passed in R.C.S.No.53/1999 (new) No.35/1999 (old) in respect of landed as well as house property.

2] The record shows that, this court had send the decree to the collector for effecting partition of the landed property under section 54 of C.P.C. The Tahsildar, Risod filed his report and informed the court that, there are differences in the area referred to in the decree and area as per revenue records so far as Survey No.60/1, 07/2, 144, 102/2 & 117/1 are concerned. Thereafter, D.H. filed application below Exh.92 for correction of area of the suit land and precept be corrected. The said application is partly allowed to correct the exact area of the suit property only after it's ascertainment to the satisfaction of the court and for ascertaining the exact area of suit property and the person on whom the decree is binding and the D.H. is directed to produced necessary documents. Thereafter, D.H. has filed application at Exh.231 for permission to incorporate amendment in plaint and decree and the sending the precept to collector but said application is rejected. Thereafter, a D.H. filed application at Exh.253 in respect of correction proceeding in landed property and said application is pending for hearing. D.H. has also filed application at

Exh.261 for appointment of court commissioner for effecting partition of house property and application at Exh.262 for sending precept to collector in respect of landed property. J.D.No.2, 3 & 7 have opposed these applications. Learned advocate for D.H., learned advocate for J.D.No.2, 3 & 7 have completed their arguments on Exh.261 i.e. application for appointment of court commission for partition of house property and said application is pending for order and applications Exh.253 & 262 are pending for hearing.

3] During argument, learned advocates of J.D.No.2, 3 & 7 submitted that, J.D. Sahebrao, Taramati, Sarswatibai and Sarubai are died and their legal representatives are not taken on record which are necessary parties and their interest is also involved in the suit property hence without joining to them as a party a matter cannot be proceeded legally therefore the application of appointment of court commission is not maintainable. Learned advocate for J.D.No.3 has relied on 1) Rajaram Mahadu Dahatonde (D) thr. Lrs ..Vrs.. Babu Mahadu Dahatonde & Ors. 2016(2) ALL MR 326, Wherein Hon'ble High Court of Bombay Bench at Aurangabad observe that, death of one of the defendants during pendency of first appeal. No steps taken to bring his legal representatives (LRs.) on record. LRs. Filing affidavit and informing that plaintiff has no adverse interest against them and they have no objection for execution of decree given by first appellate court. Held, in such cases courts are not expected to take hyper technical approach which will not protect the ends of justice.

2) Gurnam Singh (D) thr. Lrs & Ors...Vrs.. Gurbachan Kaur (D) By LR's & Ors. 2017 ALL SCR 1185, Wherein Hon'ble Supreme Court

observed that, death of applicant and 2 respondents pending appeal- No application filed to bring their legal representatives on record- Appeal stands dismissed as abated - Court however allowed appeal and passed decree – Decree so passed is a nullity - Legal representatives of respondents would have right to question legality of such decree inter alia on ground of it being a nullity by way of appeal or even in execution proceedings.

4] Learned advocate for D.H. has submitted that, decree in R.C.S.No.53/1999 is maintained by Hon'ble District Court as well as Hon'ble High Court. Therefore as per decree court commission is required to be appointed for effecting equal and separate possession between parties. He further submitted that, as per Order XXII Rule 12 of C.P.C. provisions in Rules 3, 4 & 8 of Order XXII are not applicable to the execution proceeding and it is not required to brought them on record and he relied on Judgment of Hon'ble High Court of Bombay in Kasturabai & Ors.. Vrs..Pandit Sonusingh & Ors. 2014 (4) ALL M.R.807. Wherein Hon'ble Bombay High Court observed that, Order XXII Rule 1 & 2 are not applicable to execution proceeding and the execution proceeding does not abate if the legal representatives of deceased D.H. or J.D. are not brought on record.

5] Argument heard from both sides. I also gone through the ratio laid down by Hon'ble Supreme Court and Hon'ble High Court in above case laws. Perused record it shows that, during pendency this proceeding J.D. No.1 Sahebrao Shankarrao Babar, J.D. No.4 Taramati Pandurang Jadhao, J.D. No.5 Sarswati Sidaji Yadao, J.D. No.6 Sarubai Narayan Phartade and J.D. No.8 Nayabrao Shankarrao Babar are died.

Legal representatives of deceased Nayabrao have been brought on record but legal representatives of J.D.No.1 Sahebrao, J.D.No.4 Taramati, J.D.No.5 Sarswati and J.D.No.6 Sarubai are not brought on record as on today.

6] As per provision Order XXII Rule 12 of C.P.C., -Application of order to proceedings :- Nothing in rules 3, 4 & 8 shall apply to proceedings in executions in decree or order. It makes clear that, Rule 3 & 4 do not apply to the execution proceeding and therefore the execution proceeding will not abate due to death of a party. As per Section 50 of C.P.C. Legal representative :- where judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased.

7] Record shows that, during pending of this proceeding J.D.No.1, 4, 5 & 6 are died and their legal representatives are not brought on record as on today. Further it shows that, both learned advocates have argued on Exh.261 for appointment of court commission in respect of partition of house property. The decree in R.C.S.No.53/1999 is preliminary decree and not final decree. Considering the decree for partition is joint and indivisible, the rights and shares of D.H. and J.D. including the deceased are interlinked. Without bringing on record the legal representatives of deceased J.D., effective execution of the decree cannot possible. Partition affects the rights of all co-owners and proceeding with execution in the absence of necessary parties would result in prejudice to the rights of the legal representatives of the deceased J.D. Considering nature of execution

proceeding and rights of the parties, the presence of legal representatives of J.D.No.1, 4, 5 & 6 before the court are necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the proceeding and for effective execution of decree.

8] Hence considering discussed above, presence of legal representatives of deceased J.D. No.1, 4, 5 & 6 are necessary in order to enable the court to for effectually and completely adjudication upon and settled all the questions involved in the proceeding. The appointment of court commission in such circumstances would prejudice the right of the legal representatives of the deceased J.D. Hence, it is just and proper and in the interest of justice to keep the application at Exh.261 pending and directions given to D.H. for bringing legal representatives of deceased J.D.No.1, 4, 5 & 6 on record. Hence, I pass following the order:

ORDER

- 1] D.H. is directed to take appropriate steps for bringing legal representatives of deceased J.D. No.1,4,5 & 6 on record.
- 2] Application for appointment of court commission in respect of house property at Exh.261 is kept pending till compliance of above clause.

Risod
Dt. 31/07/2025.

(D. M. Gaikwad)
Jt. Civil Judge Junior Division,
Risod.

CERTIFICATE

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

Name of the Stenographer : B. V. Bhisade, (Grade-III)

Name of court : Jt. C.J.J.D. & J.M.F.C., Risod.

Date : 31.07.2025

Order signed by the
Presiding Officer : 31.07.2025

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