

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

**ON THE 7th OF DECEMBER, 2023**

**MISCELLANEOUS PETITION NO.4734 OF 2023**

**BETWEEN:-**

1. SMT. USHABAI W/O SHRI GOPAL KANOJIYA, AGED ABOUT 51 YEARS, OCCUPATION: CASTE DHOBI, R/O PURANA GURAIYA NAKA TAHSIL AND DISTRICT CHHINDWARA (M P)
2. SMT. RUKMANIBAI W/O HARICHAND KANOJIYA, AGED ABOUT 49 YEARS, CASTE DHOBI, R/O PURANA GURAIYA NAKA, TAHSIL AND DISTRICT CHHINDWARA (M P)

**.....PETITIONERS**

***(BY SHRI JAIDEEP SIRPURKAR - ADVOCATE)***

**AND**

1. SARUBAI W/O BHADDA MALI, AGED ABOUT 80 YEARS,
2. VIMLA W/O RAJU HANVATKAR D/O BHADDA MALI, AGED ABOUT 49 YEARS,
3. BABLU S/O LATE BHADDA MALI, AGED ABOUT 40 YEARS, THROUGH GUARDIAN/MOTHER SARUBAI WD/O BHADDA CHARPE, CASTE MALI,

4. **KU. KALPANA D/O LATE SHRI PANDHRI, AGED ABOUT 30 YEARS,**
5. **MUKESH S/O LATE SHRI PANDHRI, AGED ABOUT 26 YEARS,**
6. **NITESH S/O LATE SHRI PANDHRI, AGED ABOUT 28 YEARS,**

**ALL ABOVE R/O GURAIYA ROAD, NEAR NEW SABZI MARKET, P.S. TAHSIL & DISTRICT : CHHINDWARA (MP)**

7. **SMT. BHARTI JAIN W/O DR. K.C. JAIN, AGED ABOUT 62 YEARS, R/O GULABRA, CHHINDWARA, TAHSIL AND DISTRICT CHHINDWARA (M P)**
8. **STATE OF MADHYA PRADESH, THROUGH - THE COLLECTOR, COLLECTOR OFFICE, CHHINDWARA DISTRICT CHHINDWARA (MP)**
9. **NAYAB TAHSILDAR, CHHINDWARA, TAHSIL OFFICE, CHHINDWARA (M.P.)**

**....RESPONDENTS**

**(SHRI SARABVIR SINGH OBEROI – ADVOCATE FOR THE RESPONDENTS 1 TO 6 AND SHRI VIJAY PANDEY- PANEL LAWYER FOR THE STATE)**

*This petition coming on for admission this day, the Court passed the following:*

### **ORDER**

This miscellaneous petition has been preferred by petitioners /defendants 1-2/judgment debtors challenging order dtd. 07.08.2023

(Annexure P/8) passed by 1<sup>st</sup> Civil Judge Senior Division, Chhindwara in execution case no.1/2023 whereby executing Court has dismissed petitioners' application under Section 47 r/w Section 151 CPC and has directed issuance of warrant of possession against the petitioners (Smt. Ushabai and Smt. Rukmanibai).

2. In the civil suit filed by respondents/plaintiffs, trial Court passed following decree. Last para of judgment dtd. 07.08.2009 passed by trial Court reads as under :

“अतः उक्त के सम्बन्ध में प्रकरण में निम्नलिखित आज्ञाप्ति पारित की जाती है कि : (क) यह घोषित किया जाता है कि भूमि सर्वे क्रमांक 570/7 का अंश रकबा 15X75 वर्गफुट के संबंध में प्रति क्रमांक 1 के पक्ष में दिनांक 23.10.1998 को किया गया विक्रय विलेख वादी गण पर बंधन कारी नहीं है।

(ख) यह घोषित किया जाता है कि भूमि सर्वे क्रमांक 570/7 का अंश रकबा 25X75 वर्गफुट के संबंध में प्रति क्रमांक 02 के पक्ष में दिनांक 23.10.1998 को किया गया पंजीकृत विक्रय विलेख वादी गण पर बंधन कारी नहीं है।

(ग) वादीगण वाद ग्रस्त भूमि सर्वे क्रमांक क्रमांक 570/7 के अंश रकबा 15X75 वर्गफुट एवं 25X75 वर्गफुट क्षेत्रफल पर प्रति क्रमांक 01 एवं 02 के द्वारा कराया गया निर्माण कार्य को तुडवाकर उसका रिक्त अधिपत्य प्राप्त करने के अधिकारी है।

(घ) प्रकरण की सम्पूर्ण परिस्थितियों को देखते हुए यह आदेश दिया जाता है कि उभयपक्ष अपना अपना वादव्यय स्वयं वहन करेंगे।

(ङ) अधिवक्ता शुल्क 500/- रुपये (पाँच सौ रुपये मात्र) निर्धारित किया जाता है प्रमाणित होने पर जोडा जावे।”

3. Aforesaid judgment and decree of trial Court was modified by first appellate Court vide its judgment and decree dtd. 25.02.2013, last para of which reads as under :

“24. अतः अपीलार्थी/प्रतिवादीगण द्वारा प्रस्तुत अपील निरस्त की जाती है तथा विद्वान अधीनस्थ-न्यायालय द्वारा घोषित प्रश्नगत् निर्णय दिनांक 07.08.09. एवं आज्ञापति में संशोधन करते हुए, यह घोषित किया जाता है कि भद्दा का प्रत्येक वारिस उसकी संपत्ति में 1/5-1/5 अंश प्राप्त करने का अधिकारी है, तदनुसार प्रारंभिक आज्ञापति की रचना की जाये और कलेक्टर छिंदवाड़ा को निर्णय की एक प्रति भेजकर निर्देशित किया जाये कि वे पहले उक्त वादग्रस्त संपत्ति का बँटवारा किसी राजस्व अधिकारी से करायें और बँटवारा अनुसार आधिपत्य दिलाकर विस्तृत प्रतिवदेन न्यायालय को प्रेषित करें, ताकि अंतिम आज्ञापति पारित की जा सके। इस अपील का व्यय उभयपक्ष अपना-अपना वहन करेगा। अभिभाषक शुल्क प्रमाणित होने पर या अनुसूची अनुसार जो भी कम हो, जोड़ी जावे। तदनुसार आज्ञापति बनायी जावे।”

4. Learned counsel for petitioners submits that by passing judgment and decree on 25.02.2013, 1<sup>st</sup> Additional District Judge, Chhindwara, in civil appeal no.30-A/12 modified judgment and decree dated 07.08.2009 passed by trial Court in civil suit no.21-A/08, but executing Court without taking into consideration modified decree, has dismissed petitioners' application and ordered to issue warrant of possession even without specifying the suit property. He further submits that in pursuance of judgment and decree passed by first appellate Court on 25.02.2013, no partition has taken place and until and unless partition takes place in pursuance of judgment and decree 25.02.2013, executing Court has no jurisdiction over the matter. He also submits that in pursuance of judgment and decree dated 25.02.2013, executing Court is bound to send

the requisite documents to revenue Court in view of Section 54 of the CPC but this exercise has not been undertaken by executing Court.

5. Shri Oberoi, learned counsel for the respondents 1-6 by placing reliance on order dated 17.04.2014 passed in case no.203/A-6(A)/2010-2011 by Tahsildar, Chhindwara, submits that in pursuance of judgment and decree dated 25.02.2013 partition has already taken place and executing Court only after taking into consideration order dated 17.04.2014 passed by Tahsildar, ordered to issue warrant of possession. Accordingly, he submits that there is no illegality in the impugned order and prays for dismissal of misc. petition.

6. Heard learned counsel for the parties and perused the record as well as impugned order.

7. Perusal of impugned order shows that in its order executing Court has just mentioned arguments of the parties and at the end rejected application under Section 47 r/w Section 151 CPC filed by the petitioners even without taking into consideration effect of modified judgment and decree dated 25.02.2013 passed by first appellate Court so also effect of Tahsildar's order dated 17.04.2014 relied upon by counsel for the respondents 1-6, and consequently ordered for issuance of warrant of possession. Impugned order also does not indicate as to in respect of which property, warrant of possession has been directed to be issued. In the entire order, executing Court has also not mentioned as to whether after judgment and decree passed by first appellate Court on 25.02.2013, any partition has taken place or not.

8. In the case of Kunhayammed and others vs. State of Kerala and another (2000) 6 SCC 359, the Supreme Court has held as under:-

“43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a peti-

tion for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

44. To sum up our conclusions are :-

(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having

been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.”

9. Following the aforesaid decision in the case of Kunhayammed and others (**supra**), the Supreme Court in the case of Surinder Pal Soni vs. Sohan Lal (D) Thru LR and others (**2020**) **15 SCC 771**, has held as under:-

“17. We are unable to accept the submission. The doctrine of merger operates as a principle upon a judgment being rendered by the Appellate Court. In the present case, once the Appellate Court confirmed the judgment and decree of the Trial Court, there was evidently a merger of the judgment of the Trial Court with the decision of the Appellate Court. Once the Appellate Court renders its judgment, it is the decree of the Appellate Court which becomes executable. Hence, the entitlement of the decree holder to execute the decree of the Appellate Court cannot be defeated.”

10. In the light of aforesaid settled legal position relating to principle of *merger*, it is clear that it is decree of first appellate Court, which has to be executed. But impugned order passed by executing Court does not show that it has taken into consideration decree of first appellate Court.

11. In the case of M/s Trinity Infraventures Ltd. & Ors. Etc. vs. M.S. Murthy & Ors. Etc. **AIR 2023 SC 336**, the Supreme Court has held as under:-

“191. It must be remembered that Order XX Rule 18 of the Code of Civil Procedure, 1908, lays down a procedure to be adopted by a Court while passing a decree in a suit for partition. There are two sub-rules to Rule 18 of Order XX. As per the first sub-rule, the Court passing a decree for partition may direct the partition or separation to be made by the Collector or any gazetted subordinate deputed by him, if the decree relates to an estate assessed to the payment of revenue to the Government. This shall be done, after first declaring the rights of several parties interested in the property. Under the second sub-rule, the Court may, if it thinks that the partition and separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of several parties and giving such further directions as may be required, if the decree relates to any other immovable property not covered by sub-rule (1).”

**12.** In the case of Shub Karan Bubna @ Shub Karan Prasad Bubna & Ors. vs. Sita Saran Bubna & Ors. (2009) 9 SCC 689 Supreme Court has held as under:-

“18. The following principles emerge from the above discussion regarding partition suits:

**18.1.** In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. **The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.**

**18.2.** In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.



**18.3.** As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.”

**13.** In the case of *Bikoba Deora Gaikwad & Ors. vs. Hirabai Marutirao Ghorgare & Ors. (2008) 8 SCC 198*, the Supreme Court has held as under:-

“**11.** Section 54 of the Code in effect and substance confers a duty upon the Court. The said provision must be read in the context of the Order XXVI Rule 13 of the Code and/or Section 51, Order XXI Rule 11 thereof. It is not in dispute that in the State of Maharashtra the practice to get the properties partitioned by a District Collector still continues. **Section 54 only provides for a ministerial functions of a court. It cannot be termed to be an execution proceeding.**”

**14.** In the case of *Bhagwansingh vs. Babu Shiv Prasad and another AIR 1974 M.P. 12* a Division Bench of this Court has held as under:-

“**5** Having heard learned counsel for both the parties, we are of the opinion that the contention advanced by the learned counsel for the appellant has substance and as such must be accepted. We shall first like to refer to the relevant provisions of the Code of Civil Procedure before dealing with the point involved in the present case. Rule 18(1) of Order XX of the Code reads as under :

"R.18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, -

(1) if and in so far as the decree relates to an estate assessed; to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54."

Section 54 of the Code reads as under :

"54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for

the time being in force relating to the partition, or the separate possession of shares of such estates."

A perusal of the aforesaid two provisions make it clear that the rule does not contemplate passing of a final decree. All that is required of a civil Court in a case for partition of an undivided estate assessed to the payment of land revenue to the Government, or for the separate possession of a share of such an estate, is to only pass a preliminary decree and declare the rights of the several parties who are interested in the property and nothing more and give direction for such partition or separation to be made by the Collector or any gazetted officer subordinate to the Collector deputed by him in this behalf in accordance with such declaration and with the provisions of Section 54 of the Code. Thereafter, the execution has to be effected by the Collector. The reason is that the revenue authorities are more conversant and better qualified to deal with such matters than the Civil Court and interest of the Government with regard to the revenue assessed on the assets would be better safeguarded by the Collector executing the decree than by the Court. The partition contemplated by Section 54 is not confined to mere division of lands but includes also the delivery of the shares of the respective allottees. Thus, the Collector or his subordinate would be completely carrying out the partition. **The civil Court after passing of the preliminary decree for partition of an undivided estate assessed to the payment of land revenue becomes functus officio and it would have no jurisdiction to act in any manner thereafter so as to pass a final decree or deliver possession to a party in accordance with the said decree."**

**15.** Taking into consideration the law laid down by Supreme Court in the case of M/s Trinity Infraventures Ltd. and Ors. Etc. (**supra**); Shub Karan Bubna @ Shub Karan Prasad Bubna & Ors. (**supra**); Bikoba Deora Gaikwad & Ors. (**supra**) and by Division Bench of this Court in the case of Bhagwansingh (**supra**), it can be said that in suit of partition of agricultural land, Civil Court has only power to declare the shares of parties and it has no other power and after exercising that power, the Court becomes functus officio. After declaration of shares by the Court, initial application for an order for execution has to be made in the Civil Court, who will send requisite papers to the Collector/Revenue Authority but the actual execution by effecting partition and delivery of possession is to be made only by the Collector/Revenue Authority. Hence, the Civil Court has no power to do this exercise even if the parties agree to it.

**16.** In view of aforesaid discussion, impugned order dtd. 07.08.2023 dismissing petitioners' application under section 47 r/w Section 151 CPC,

is hereby set aside and matter is remanded to executing Court to decide the petitioners' application afresh after taking into consideration the aforesaid legal position. In case, executing Court is of the view that the objection raised by way of said application filed on behalf of the petitioners, has no merit, then it shall proceed further with the execution only in accordance with the aforesaid binding legal position.

17. Resultantly, misc. petition is allowed and disposed off.

18. Pending application(s), if any, shall stand disposed off.

**(DWARKA DHISH BANSAL)**  
**JUDGE**

pb