IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2526 OF 2023

Kishore Tulshiram Mantri .. Petitioner

Versus

Dilip Janak Mantri & Ors. .. Respondents

INTERIM APPLICATION (ST) NO. 14698 OF 2024
IN
WRIT PETITION NO. 2526 OF 2023

Kishore Tulshiram Mantri Applicant / .. Petitioner

Versus

Dilip Janak Mantri & Ors. .. Respondents

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- Mr. Rameshwar Totala a/w. Mr. Satkar Gosavi, i./by Mr. Vishal Tambat, Advocates for Petitioner.
- Ms. Seema Sarnaik a/w. Mr. Anuj Tiwari, Advocates for Respondents.

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CORAM : MILIND N. JADHAV, J.

DATE : JULY 01, 2024.

JUDGMENT:

1. This Writ Petition takes exception to the judgment and order dated 24.11.2022 passed by the Joint Civil Judge (Senior Division), Nashik (for short the "Executing Court") in Application filed below Exhibit "89" in Final Decree Application No.7 of 2019. By virtue of order dated 24.11.2022, Executing Court has rejected Application below Exhibit "89" filed by Defendant No.8 – Writ Petitioner seeking framing of issues for deciding the shares of legal heirs of deceased

Tulshiram Ratanchandra Mantri and seeking an inquiry for modification of shares determined by the preliminary decree dated 27.11.2014 in Special Civil Suit No.575 of 2010.

2. Briefly stated, Suit property is a non-agricultural land parcel bearing Survey No.2A/1A/2, C.T.S. No.1449 to 1507 admeasuring 1570 square meters alongwith one standing structure thereon admeasuring 125.46 square meters situated at M.G. Road, Old Lamp Road, Deolali, Shiwar, Nashik (for short "**Suit property**"). Respondent Nos.1 and 2 are original Plaintiffs in Special Civil Suit No.575 of 2010 before the Civil Judge, (Senior Division), Nashik. Suit was filed for partition and separate possession of Suit property on 23.09.2010. Suit property admittedly belonged to Tulshiram Ratanchandra Mantri, father and predecessor-in-title of parties to Special Civil Suit No.575 of 2010.

2.1. Tulshiram Mantri expired intestate on 27.05.1975 and his wife predeceased him on 03.04.1975 as stated in the Suit plaint. They are survived by two sons and six daughters who were arrayed as Plaintiff No.2 and Defendant Nos.1 to 8 to the partition Suit. Partition Suit was filed on the premise that each of the eight siblings are entitled to 1/8th share in the Suit property. Some of the original parties to the Suit expired in the interregnum and are now represented by their legal heirs. Original Defendant Nos.1, 3, 4, 5 and 7 admitted the case of

Plaintiff and consented for partition. Original Defendant No.8 – Writ Petitioner resisted and contested the Suit unsuccessfully right upto the Second Appeal stage in this Court. After failing in Second Appeal he did not challenge the partition decree any further and thus the said decree become absolute. He is the Petitioner before me.

2.2. In the partition Suit proceeding before the Trial Court, on 18.03.2014, Plaintiff No.2 filed Affidavit-in-lieu of examination-in-chief and was extensively cross-examined by Advocate for Defendant No.8 – Writ Petitioner. On 07.10.2014, Defendant No.8 – filed Affidavit-in-lieu of examination-in-chief and he was extensively cross-examined by Advocate for Plaintiffs. By judgment and decree dated 27.11.2014, Suit was partly decreed, *inter alia*, declaring that Plaintiff No.2 being entitled to 5/8th share in the Suit property and 1/8th share in the property described as No.2(a-i) in the Suit plaint. There is one more property mentioned in the Suit which was left out since there were many other stakeholders therein. Some of the siblings (sisters) relinquished their share in favour of Plaintiff No.2 (brother).

2.3. On 07.07.2015, Plaintiffs filed Special Darkhast No.39 of 2015 which was converted to Final Decree Application No.7 of 2019 for realization of decree dated 27.11.2014. All that was required to be done was to effect division of shares as per partition decree.

2.4. In 2016, much belatedly original Defendant No.8 – Writ Petitioner filed Civil Appeal No.442 of 2016 before the District Court, Nashik to challenge the judgment and decree dated 27.11.2014. On 03.03.2017, the District Judge dismissed Civil Appeal No.442 of 2016. Being aggrieved by dismissal of Appeal, in the year 2018, Defendant No.8 – Writ Petitioner filed Second Appeal No.374 of 2018 in this Court. By judgment dated 14.08.2018, Second Appeal was dismissed. Defendant No.8 – Writ Petitioner filed Review Petition (Stamp) No. 26121 of 2018 before this Court, which was dismissed on 10.10.2018. Defendant No.- Petitioner did not challenge the dismissal of his Second Appeal before the Supreme Court. Thus the Partition Decree dated 27.11.2014 became absolute.

2.5. For the first time on 07.12.2019,Defendant No.8 – Petitioner filed Application below Exhibit “78” before the Executing Court and produced a certified copy of the registered Will of his father Tulshiram Mantri. This application was allowed pursuant to which copy of the registered Will was taken on record by the learned Executing Court. On 15.02.2021, Defendant No.8 – Writ Petitioner filed a further Application below Exhibit “89” seeking framing of issues on the basis of the registered Will of Tulshiram Mantri and sought an inquiry for modification of the shares determined in the preliminary decree on the basis of the shareholding as stated in the said Will on the ground of changed circumstances. This Application below Exhibit “89” was

resisted and contested by Plaintiffs and other Defendants. By the impugned order dated 24.11.2022, the learned Executing Court rejected the Application below Exhibit “89” leading to filing of the present Writ Petition. The impugned order is at Exhibit “N” - page No.142 of the Petition.

3. Defendant No.8 – Writ Petitioner has stated that on 23.12.2022, he received certified copy of the Index – III of the registered Will dated 13.03.1970 of his father Tulshiram Mantri. One of the submissions advanced by Defendant No.8 – Writ Petitioner before the learned Executing Court is that the decree passed by the Trial Court dated 27.11.2014 was a preliminary decree and therefore proceedings before the Executing Court are a continuation of the Suit proceedings itself and hence the Executing Court has power to determine rather re-determine the shares on the basis of the registered Will at the time of inquiry in Final Decree Application No.7 of 2019 and also conduct a trial to redetermine the shares.

4. According to Defendant No.8 – Writ Petitioner, under the registered Will executed by the deceased Tulshiram Mantri, he was bequeathed 43.75% share in the Suit property. This submission of the Defendant No.8 – Writ Petitioner has been refuted, negated and rejected by the learned Executing Court for the reasons which are enumerated in paragraph Nos.7 to 11 of its order dated 24.11.2022.

5. It is averred in the Writ Petition and even vehemently argued by Mr. Totala, learned Advocate for the Petitioner that Application below Exhibit "89" filed by Defendant No.8 – Writ Petitioner for framing of fresh issues for reconstitution of shares owing to change in circumstances ought to have been allowed on the basis of the registered Will of Tulshiram Mantri brought on record by him. Though it is alleged by Defendant No.8 – Writ Petitioner that the Will was infact suppressed by his co-brother and Defendant Nos.1 to 7 (his sisters), save and except such a bald allegation, there is nothing on record to show that the said Will was deliberately suppressed by the Respondents. Upto Review proceedings after dismissal of the Second Appeal, at no stage Defendant No.8 has ever whispered or alleged about having knowledge of execution of his father's Will either to the Court or in his pleadings. Admittedly, the alleged Will has been unveiled and disclosed for the 1st time by Defendant No.8 – Writ Petitioner himself through suspicious circumstances which I will advert to later in much detail. These circumstances incidentally are not stated in the Writ Petition nor in any of the pleadings but have been disclosed for the first time across the bar by the Defendant No.8 – Writ Petitioner during the hearing of the present Petition and they are somewhat shocking the conscience of the Court. Relevant documentary evidence has been taken on record at the time of hearing in this regard in order to deal with the same.

6. Only other ground agitated by Defendant No.8 – Writ Petitioner is that when the Suit was originally filed, it was on the basis that Tulshiram Mantri (his father) had expired intestate, but after unearthing of his Registered Will executed in 1970, for the first time in the year 2019, it amounted to change in circumstances due to availability of crucial evidence and hence, Application below Exhibit "89" ought to have been allowed. Nothing is stated about delay, laches and due diligence whatsoever. Another feeble submission which deserves to be dismissed in *limine* is that since the alleged Will was taken on record while allowing Application below Exhibit "78", the Court was obliged to allow Application below Exhibit "89". It is contended that Respondents have not challenged the order dated 18.02.2020 passed below Exhibit "78" and hence they were now precluded from objecting the Application below Exhibit "89". This submission is dismissed on the face of record as frivolous and vexatious.

7. Mr. Totala, learned Advocate appearing for Defendant No.8 – Writ Petitioner in support of Petitioner's case argued that in the facts of the present case, Executing Court will have to go behind the partition decree passed by the learned Trial Court even though it has been confirmed right upto the Second Appellate Court stage and Review proceedings therein in view of "change in circumstances" since the proceeding before the Executing Court is not in execution but a

Final Decree Application.

7.1. He would submit that filing of Special Darkhast Application for execution of preliminary decree is not maintainable in the eyes of law unless and until final decree is prepared and the suit is completely disposed of, which according to him is the settled position in law. He would submit that judgment dated 24.11.2014 itself mentions that *"preliminary decree be drawn up accordingly"* and in that view of the matter the Suit is not completely disposed of until final decree has been drawn up. According to him, preliminary decree is purely declaratory in nature and for making the same executable, final decree is yet to be passed and only thereafter a party can file for execution of the decree and it can be considered further.

7.2. He has drawn my attention to page No.73 of the Petition wherein learned Trial Court order dated 01.04.2019 reads that *"proceeding be registered as final decree proceedings"* and therefore would vehemently submit that since the proceeding is registered as Final Decree Application No.7 of 2019, it is not an execution proceeding. He would submit that order dated 01.04.2019 is not challenged by Plaintiffs and other Defendants who are decree holders and therefore even they have admitted it to be a Final Decree Application and not execution proceedings.

7.3. He has drawn my attention to the definition of decree under Sub-section 2 of Section 2 of the Code of Civil Procedure, 1908 read with the provisions of Section 97 of the Code of Civil Procedure, 1908 to contend that a decree is preliminary when further proceedings in the suit can be completely disposed of and in the present case no final decree has been drawn up in the present case and the same is under preparation in Final Decree Application No.7 of 2019.

7.4. He would submit that the Application filed by Petitioner - Defendant No.6 under Exhibit "78" for production of the Certified copy of the last Will of late Tulshiram Mantri on 07.12.2019 has been allowed by the learned Executing Court by order dated 18.02.2020 and most importantly this order has not been challenged by the other parties who are Decree holders before the Executing Court. He would submit that Decree holders have unanimously alleged that certified copy of the Will of Tulshiram Mantri produced by the Writ Petitioner is a false document, that it is of the year 1970 i.e. 50 years prior in point of time, that the signature on the Will is not that of Tulshiram Mantri and it is produced to prolong and protract execution. He would submit that since final decree application is not concluded, it is the duty of Executing Court to decide the validity of Will produced by Petitioner and only thereafter shares of parties be determined and if so required the decree passed by the Trial Court be amended after framing of appropriate issues and conduct of trial.

7.5. He would submit that in view of the Will having been taken on record by the Executing Court, Petitioner was compelled to file Application below Exhibit - "89" urging the Executing Court to consider the Will and re-determine the shares of parties which is rejected by the impugned order. He would contend that rejection of Application below Exhibit 89 is incorrect as the issue of consideration of Will of the deceased has not been decided at all. He would submit that production of certified copy of the Will by Petitioner – Defendant No.8 is a "changed circumstance" and Executing Court ought to take it into consideration, frame fresh issues for redetermination of shares on the basis of the Will and conduct a trial and only thereafter adjudicate and modify the preliminary decree.

7.6. He would submit that his above propositions are supported by the following decisions:-

(i) ***Bashiruddin Khwaja Mohiuddin Vs. Binraj Murlidhar Shop at Malkapur and Ors.***[1];

(ii) ***Gujarat Housing Board Vs. Kalpeshkumar Naranbhai Patel and Ors.***[2];

(iii) ***Ganduri Koteshwaramma and Anr. Vs. Chakiri Yanadi and Anr.***[3]; and

(iv) ***M/s. Puri Investments Vs. M/s. Young Friends and Co. & Ors.***[4]

1 AIR 1987 Bombay 235
2 2001 SCC Online Guj. 212 : (2002) 2 GLH 113
3 2012 (1) Mh.L.J. 613
4 Civil Appeal No.1609 of 2022 decided on 23.02.2022.

7.7. On the basis of the above submissions, he would submit that the impugned order dated 24.11.2022 at page No.142 of the Petition be quashed and set aside and resultantly Exhibit - “89” be allowed by this Court.

8. ***PER-CONTRA,*** Ms. Sarnaik, learned Advocate for Respondents, at the outset would submit that Defendant No.8 – Writ Petitioner has admittedly never at any point of time in his pleadings filed before various Courts referred to the alleged registered Will of Tulshiram Mantri of 1970 which was disclosed from his custody for the first time only in the year 2019. She would submit that, being surprised by the existence of the alleged Will of 1970 of Tulshiram Mantri, Respondent No.10 filed Application under the Right to Information Act before the Deputy Registrar (Information Officer), Sub-Registrar Office, Nashik - 1 seeking information regarding registration of any Will by Tulshiram Mantri during the period from 01.03.1970 till 31.05.1975, however the said Application was never replied to. Thereafter Respondent No.10 filed further Application seeking search and inspection of the relevant register with the Authority, however even that Application remained unanswered. She would submit that being aggrieved by the aforesaid omissions, Respondent No.10 filed Appeal No.26 of 2023 before the Appellate Authority which was allowed by order dated 27.06.2023 directing that copy of document regarding which information was sought by

Respondent No.10 be provided to him within 30 days from the date of passing of the order. She would submit that however till date copy of the alleged registered Will has not been provided to Respondent No.10. This is however refuted by Mr. Totala, as according to him copy of the Will was provided to Respondent No.8 (one of the sister) on her Application by the office of the Sub-Registrar.

8.1. She would submit that the aforesaid circumstances clearly cast a shadow of doubt on the veracity and authenticity of the alleged registered Will of Tulshiram Mantri produced belatedly by Defendant No.8 – Writ Petitioner. She would submit that the only possible motive behind Defendant No.8 – Writ Petitioner belatedly producing the alleged registered Will can be that presently he is occupying a substantial portion of the Suit property, much of which is road facing and hence in order to delay execution proceedings which are pending before the learned Executing Court, he has now disclosed the alleged registered Will and filed Application below Exhibit "89" to protract execution of the decree dated 27.11.2014 and enjoy *status quo*.

8.2. She would submit that copy of the Suit plaint appended at Exhibit "A" to the Writ Petition is also not the original copy of the plaint. That Petitioner has suppressed it to conceal material relevant fact from this Court. According to her the actual copy of Suit plaint is a handwritten plaint containing material information of various tenants

in the Suit property who were occupying the Suit property and it has specific averments pertaining to the health of Tulshiram Mantri i.e. he was suffering from serious ailments for a period of 10 to 12 years prior to his death. Hence, according to her, father drawing up the alleged Will to the benefit the 2 sons to the exclusion of his six daughters when all of them are minor is itself a very suspicious act and circumstance. She would submit that such fact was only to the exclusive knowledge of the Petitioner and not his own elder brother, a beneficiary under the alleged Will is in itself a very suspicious.

8.3. She has drawn my attention to the Report dated 26.09.2016 filed by the Court Commissioner before the Executing Court which provides a detailed map of the Suit property indicating demarcation as to how the Suit property can be partitioned as per the decree dated 27.11.2014, which makes it clear that the Suit property is not in any dilapidated state. She would submit that Writ Petitioner - Defendant No.8 has blocked the entire access to the Suit property for the Respondents who are residing in the building by placing 4 to 5 old unused cars/four wheelers on the Suit property. She has shown the photograph of these vehicles blocking the entrance of the building structure on the suit property wherein some of the Respondents are residing at present.

8.4. In view of her above submissions, Ms. Sarnaik would pray for dismissal of the Writ Petition as according to her the order dated 24.11.2022 has been passed correctly and the Defendant No.8 is attempting to delay delaying the execution of the partition decree.

9. I have heard Mr. Totala, learned Advocate for the Petitioner and Ms. Sarnaik, learned Advocate for the Respondents and with their able assistance perused the record and pleadings of the case. Submissions made by both learned Advocates have received due consideration of this Court.

10. In the present case it is seen that before the judgment and decree was passed by the learned Trial Court in Special Civil Suit No.575 of 2010, both sides filed substantive pleadings and also led their respective evidence. Defendant No.8 unsuccessfully challenged the partition decree right upto the Second Appeal stage in this Court. Thereafter the judgment delivered in Second Appeal is not challenged any further by the Defendant No.8 and has therefore become absolute. Defendant No.8 has in his pleadings right throughout never ever alleged and/or stated or commented upon the existence of any Will of his father or that he had knowledge of existence of any such Will. This fact is crucial because for the first time in 2019 he specifically claims that he had prior knowledge of this fact and he had been searching for the Will for innumerable years/period of time (*emphasis supplied*). I will advert to this in detail in my findings herein.

11. It is seen that by a comprehensive detailed judgment dated 27.11.2014 passed by learned Trial Court, Special Civil Suit No.575 of 2010 was decreed. In that Suit proceeding, Petitioner i.e. Defendant No.8 filed one written statement and thereafter three additional written statements. This was in view of the fact that on three occasions the Suit plaint was amended. It is seen that it has been the categorical stand of Petitioner – Defendant No.8 in all his pleadings and also in his cross examination in the Partition Suit before the Trial Court that partition of the Suit properties had never taken place and he did not have any document to show that partition of the Suit properties was done during the lifetime of his father, Tulshiram Mantri. He also specifically in his deposition and cross-examination stated so. This stand of Petitioner was accepted by the Trial Court while decreeing the Suit for partition in equal proportions to all 8 children of Tulshiram Mantri @ 1/8th share each. Learned Trial Court has so returned the above finding while discussing issue Nos.3 and 3A in its judgment. It is then seen that Petitioner being aggrieved filed First Appeal No.442 of 2016, Second Appeal No. 374 of 2018 and Review Petition (Stamp) No.26121 of 2018 but was unsuccessful all throughout the hierarchy of the Courts. The judgment in the Second Appeal was reviewed unsuccessfully and it has now become absolute and final. That decision has not been challenged by Petitioner in the Supreme Court. Without doing so, the Petitioner is now asking the

Executing Court to disregard all above judgments and orders passed by the Superior Courts and revisit the partition decree itself and conduct a fresh trial by framing fresh issues and seeks modification of the decree. Whether the Executing Court can go behind the decree which has been confirmed upto the Second Appellate Court stage and which has become final and absolute is the question to be decided in the facts and circumstances of the present case? The answer to be above question is a clear "NO" for the following reasons.

12. The disclosure of the alleged Will made in 1970 by Tulshiram Mantri from the Petitioner's custody is *prima facie* not only a highly suspicious issue but it also needs to be tested. Though the learned Executing Court has passed a reasoned judgment dismissing the Application below Exhibit "89", the Petitioner has re-agitated the same issue before this Court. It is surprising to note that the Will has been disclosed from the custody of Petitioner and merely taken on record without enquiry as to how it surfaced from the Petitioner's custody. Petitioner had complete and absolute knowledge about its existence according to Petitioner's own statement / documentary evidence placed on record. Rather this documentary evidence was not even placed on record. It is only this Court that questioned the Petitioner and the Petitioner placed the relevant documentary evidence evidencing that he had prior knowledge of the Will and was searching for the same for a long time.

13. Let us therefore see as to how the Petitioner has produced the certified copy of the Will and analyze the same. During the course of submissions when this question was put to the learned Advocate for the Petitioner Mr. Totala, he would submit that there were no pleadings to this effect at all, but he agreed to produce all details before the Court. He has placed on record a compilation of 5 documents as under:-

(i) Letter dated 07.08.2019 addressed by the Petitioner to Advocate Mr. Tushar P. Patel;

(ii) Application dated 09.08.2019 by Advocate Tushar P. Patel to the Sub-Registrar for seeking search of the Will of Tulshiram Mantri from its record from 1961 to 1975;

(iii) Challan dated 09.08.2019 for Rs.375/- feepaid by Advocate Tushar P. Patel;

(iv) Letter dated 13.08.2019 by Advocate Mr. Tushar P. Patel to the Petitioner stating that on 09.08.2019 he took search and came across a registered copy of Will of his father in the record; and

(v) Application dated 13.08.2019 by Advocate Tushal P. Patel to Sub-Registrar seeking certified copy of the Will.

13.1. The letter dated 07.08.2019, Application dated 09.08.2019, Challan dated 09.08.2019, letter dated 13.08.2019 and Application dated 13.08.2019 are taken on record and marked “X-1” to “X-5 for

identification since these documents are never placed on record or disclosed by the Petitioner in his Application filed below Exhibit “74” and “89” before the Executing Court.

14. In the letter dated 07.08.2019 addressed to Advocate Tushar P. Patel, Petitioner states that his father expired on 26.05.1975 and according to his information (*माहीती प्रमाणे*) and knowledge a few years before his demise he had prepared his Will and may have registered it also. He next states in the same letter that for innumerable years / period of time he has been searching for the Will and has attempted to take search of the same but he was unsuccessful. He then states that he recently received information about the Advocate i.e. Tushar P. Patel who took search of such instruments / documents. Hence, he calls upon this Advocate to take search and find out whether the Will of his deceased father Tulshiram Mantri has been registered with the Sub – Registrar of Assurances, Nashik. He then calls upon the Advocate to take search of the record of 15 years period between 1961 to 1975.

15. At this stage, it needs to be stated that the contents of the above letter are shocking. According to this letter, it is revealed that Petitioner - Defendant No.8 had complete knowledge and information about his father’s Will and he was taking search of the same for innumerable years / period of time. The letter is in Marathi language

and I have translated it correctly as I am well conversant with spoken and written Marathi language, being a Maharastrian. However such pleading / averment is not found in any of Defendant No.8's pleadings filed in the Suit proceedings and in any of his pleadings filed in the hierarchy of the Courts right upto the Second Appeal stage / Review proceedings. Another statement stated in this letter is that Petitioner - Defendant No.8 has been taking search of the alleged Will for the last innumerable years / period of time. Even such a stand is not found to be appearing in any of his pleadings right upto the Second Appeal stage / Review proceedings. This letter therefore reveals that despite having knowledge about his father's Will, Petitioner suppressed the said information from all Courts throughout the hierarchy of Courts. It is seen that on receiving letter dated 07.08.2019 from Petitioner, on 09.08.2019 which is a Friday, an Application is filed by Advocate Tushar P. Patel in the office of Sub – Registrar of Assurances, Nashik for taking search of the record from 1961 to 1975 (15 years) for the alleged Will. Receipt of payment of fee shows that fee is paid in cash by Advocate Tushar P. Patel on 09.08.2019 at 03:10 p.m. It is pertinent to note that 10.08.2019 and 11.08.2019 being a Saturday and Sunday are presumably non - working days (holidays). Mr. Tushar P. Patel, Advocate thereafter writes a letter on 13.08.2019 to Petitioner - Defendant No.8 stating that on 09.08.2019 he paid the amount / charges for taking search and he himself took search on that day and

while doing so he came across the alleged Will of Mr. Tulsiram Mantri registered in the office of the Sub – Registrar in the year 1970. It is seen that within a few hours of paying the fees, the Advocate was not only allowed to take search of the registration record for 15 years (1961 – 1975), but he was successful in tracing the alleged Will. *Prima facie* the aforesaid timeline discloses suspicion. Though I would not like to comment upon the registered copy of the Will produced as that is not the issue before me, but what is stated in the letter of Defendant No.8 addressed to the Advocate if considered, clearly discloses that Petitioner had complete knowledge and information of the Will of his father, but he deliberately suppressed this information and never pleaded it in any of his pleadings. Therefore at this stage can he be allowed to rely on it is the question, assuming that it is the Will of his father? The answer is once again a clear "NO". There is absolutely no due diligence on the part of Petitioner. The Petitioner - Defendant No.8 as also all other Defendants suffered a decree. The only objector was Defendant No.8 whose all objections were negatived throughout the hierarchy of Courts in the country except the Supreme Court. The decree has become final and once this is so, it is not now open to Defendant No.8 to plead new facts, rather facts which were to his knowledge and he deliberately chose not to plead them. This is the only sequitor this Court can draw from the above observations and findings. Even if it is true that the new facts pleaded by Defendant

No.8 may constitute a formidable defence, it is not open for him to plead the same in execution proceedings. Such a pleading is clearly barred by the principles of constructive *res judicata* since it is settled principle of law that the Executing Court cannot go beyond the scope of the decree.

16. There is another aspect which needs to be considered. The Defendant No.8 is pleading this new fact as a "changed circumstance" which has surfaced. This new fact disclosed by him has admittedly taken place after the decree has become final. Though it is argued that there is an indistinction and final decree is still pending, such a plea cannot be countenanced since the decree has been upheld upto the Second Appeal stage only at the insistence and challenge of Defendant No.8 and thereafter he has not challenged the same further thus making it absolute.

17. Now coming to the incident of surfacing of the Will, it is an admitted position that Defendant No.8's all previous pleadings are completely devoid of and bereft of the aforesaid fact or for that matter even the fact that he had information and knowledge of the alleged Will as stated in his letter dated 07.08.2019 to his Advocate or he was taking search for a long period of time. Right until the Second Appeal stage there is not a whisper of the above facts. The Defendant No.8 has miserably failed in due diligence rather there is no due diligence at

all. Gross delay and laches is writ large on the face of record. Admittedly in this background, Defendant No.8 cannot be permitted to open a fresh round of litigation on the basis of the alleged Will about which he had complete knowledge. The anomaly is that the Defendant No.8 wants the Executing Court to now function as a Trial Court despite the partition decree becoming absolute and he not challenging the same beyond Second Appeal and this is impermissible in law to now allow such an issue to be raised for the first time in the Executing Court. It will certainly amount to a travesty of justice and would give an opportunity to Defendant No.8, who after failing at all levels during the trial, has put up the plea of non - executionability of the decree, which was very much available to him during trial. Construing the timeline in the present litigation and allowing Defendant No.8's plea would be amounting to restarting of a fresh trial on the basis of a plea which was available to the Defendant No.8 previously but was not taken by him either knowingly or even unknowingly. In this case, in view of the letter dated 07.08.2019, I come to the definite conclusion that the Defendant No.8 had complete knowledge of his father's Will since he himself admits and states therein that according to his information his father had made a Will prior to his demise and may have registered it and most importantly he has been taking search for the same for the last innumerable years / period of time. In such admitted and strong facts, despite the defence available to the

Defendant No.8 earlier and he not adopting it, the Defendant No.8 now cannot be allowed to take a fresh plea at this stage in execution as it would be totally against the larger interest of the society at large. This is a fit case for Application of the principle of constructive *res judicata* because if not in this case then very few decrees would attain finality and decrees would remain a paper tiger for ages which cannot be allowed to prevail. In this regard there is one more aspect that needs to be considered if submission of Mr. Totala is to be countenanced. That question would be whether the original decree passed by the Court is a nullity or otherwise. This is because of the Application of the provision of Section 47 of the Code of Civil Procedure, 1908.

18. The Supreme Court in the case of ***Brakewel Automotive Components (India) Pvt. Ltd. v. P.R. Selvam Alagappan***[5] in paragraph Nos.21 and 22 have held as under-

> *" 21. Judicial precedents to the effect that the purview of scrutiny Under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and Ors. 1971 (1) SCR 66 in essence enunciated that only a decree which is a nullity can be the subject matter of objection Under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt:*
>
> *A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the*

5 MANU/SC/0282/2017

parties. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

22. Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh v. Jai Prakash University and Ors. : AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power Under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree inexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree inexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view."

19. Attention is also invited to the decision of the Supreme Court in the case of ***Pradeep Mehra Vs. Harijivan J. Jethwa (Since Deceased thr. L.Rs.) and Ors***[6]. Paragraph No.5 of the said decision is relevant and reproduced hereinunder -

" 5 . A bare perusal of the aforesaid provision shows that all questions between the parties can be decided by the executing court. But the important aspect to remember is that these questions are limited to the "execution of the decree". The executing court can never go behind the decree. Under Section

6 MANU/SC/1189/2023

47, Code of Civil Procedure the executing court cannot examine the validity of the order of the court which had allowed the execution of the decree in 2013, unless the court's order is itself without jurisdiction. More importantly this order (the order dated 12.02.2013), was never challenged by the tenants/judgment debtors before any forum. The multiple stages a civil suit invariably has to go through before it reaches finality, is to ensure that any error in law is cured by the higher court. The appellate court, the second appellate court and the revisional court do not have the same powers, as the powers of the executing court, which are extremely limited. This was explained by this Court in Dhurandhar Prasad Singh v. Jai Prakash University and Ors. MANU/SC/0381/2001 : (2001) 6 SCC 534, in para 24, it had stated thus:

2 4 . ..... The exercise of powers Under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that executing court can allow objection Under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.

This Court noted further:

..... The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original Defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law. ”

19.1. From the above it is seen that an Executing Court cannot go behind the decree between the parties until it is set aside in an appropriate proceeding and it shall be binding between parties even if erroneous.

20. In the facts of the present case, Original Suit being Special Civil Suit No.575 of 2010 was filed by Plaintiff No.1, who was son of Defendant No.2 seeking partition of ancestral / suit property

admittedly belonging to Tulshiram Mantri. Defendant No.2 father of Plaintiff No.1 (original Plaintiff) was thereafter transposed as Plaintiff No.2. Admittedly Plaintiff No.2 being the eldest son of Tulshiram Mantri has taken due care of the Suit property by preserving, augmenting and protecting the same apart from establishing the business of the Petitioner i.e. Defendant No.8. There are two brothers (Plaintiff and Defendant No.8) and six sisters. Suit was filed for partition. Defendant No.1, 3 and 4 (three sisters) executed a registered relinquishment deed of their respective share each in favour of Plaintiff No.2 on 30.01.2011. Similarly Defendant No.5 (another sister) also executed and registered a relinquishment deed of her share in favour of Plaintiff No.2. In that view of the matter, Suit was filed by Plaintiff No.2 seeking declaration that he was entitled to 5/8th share in the Suit property and separate possession of his share. Defendant No.7 (another sister) filed her Written Statement contending that she be awarded her 1/8th share. It is seen that Defendant No.8 filed his Written Statement and filed amended written statements below Exhibits 62, 120 and 131 contending that the sisters who had relinquished their shares in favour of Plaintiff No.2 did not have any concern with the Suit property and sought dismissal of the Suit. In none of the above proceedings / pleadings, the Defendant No.8 ever pleaded the issue of knowledge or search of the Will of his father, which he has admitted in his letter dated 07.08.2019 addressed to his

Advocate. He deliberately chose to do so or otherwise for reasons best known to him. He cannot take advantage of his own suppression of this material fact.

21. In the Suit before the Trial Court, Plaintiff No.2 in support of his case, referred to and relied upon several documents which were marked as Exhibit Nos.:-137 to 184, most of them being proceedings, pleadings and decrees of the Trial Court in respect of protecting the Suit property from tenants / eviction of tenants from 1982 onwards until the filing of the Suit for partition. Case of Plaintiffs was resisted by Defendant No.8 staunchly by relying upon these documents which were marked as Exhibits by the learned Trial Court. It was the case of Defendant No.8 that his sisters who relinquished their shares and other sisters also would not be entitled to any partition or share. Defendant No.8 pleaded that his sisters were also prohibited from giving their share to Plaintiff No.2 and sought 50% share in the Suit property to himself. He never ever raised the plea of his father's Will even faintly despite he having complete knowledge and had also beeen searching for the same for many years simultaneously at the same time. The learned Trial Court on the basis of evidence of parties held that the Suit properties were purchased by Tulshiram Mantri and were his own self acquired properties which were to be partitioned between his legal heirs and such legal heirs would undoubtedly include all his daughters. All parties and most importantly Defendant No.8 admitted that Suit

properties were purchased by Tulshiram Mantri. In Defendant No.8's cross-examination, he also stated that he wanted his share to be separated and if 50% share was given to him he would agree to partition. Effectively, before the Trial Court Defendant No.8 sought 50% share, however he could never prove the basis of such a claim.

22. What is seen is that Defendant No.8 agreed and accepted in his cross-examination that partition of the suit properties had never taken place during the lifetime of his father Tulshiram Mantri and that the suit properties were joint family properties. The Defendant No.8 was infact aggrieved with the relinquishment of the shares by his sisters in favour of Plaintiff No.2. In this above backdrop, after passing of the decree by the Trial Court for partition and the same having been upheld in First Appeal, Second Appeal and Review proceedings, the Defendant No.8 has now approached the Executing Court by miraculously remembering that he had knowledge about his father Tulshiram Mantri having prepared his Will during his lifetime and may have registered it and he himself was searching for that Will since a very long time. These are clearly suspicious circumstances. Defendant No.8 failed miserably to bring this known fact on record and has now obtained a copy of the alleged Will made by his father in the year 1970 and registered in the year 1971. From the record it is borne out that in the year 1975 when Tulshiram Mantri expired, Defendant No.8 was a minor. If this be so then in the evidence of Defendant i.e. in his

cross-examination, he has given a specific admission that he has no document to show that partition ever took place during the lifetime of his father. This admission contradicts his own case now when he seeks to produce a copy of his father's alleged Will which fact was earlier known to him. In the First Appeal before the District Court once again the Defendant No.8 raised a grievance that relinquishment of his sisters' shares in favour of Plaintiff No.2 was illegal and such relinquishment has to be only in favour of the rest of the other coparcenors and not in favour of one of them. He never ever raised the issue of his father's Will despite having knowledge about it at that time. Contention of Defendant No.8 was rejected by the 1st Appellate Court. The Second Appellate Court further upheld the order passed by the first Appellate Court and held that relinquishment by the sisters in favour of Plaintiff No.2 was done correctly in accordance with law.

23. In Review petition Defendant No.8 came up with a new case and sought framing of an issue that partition of the joint family properties had already taken place during the lifetime of Tulshiram Mantri. The learned Court dismissed the Review Petition on the ground that Defendant No.8 had remained silent all throughout and never sought framing of any such issue during the Trial or during the First Appeal.

24. After failing all throughout, Defendant No.8 has now come up with an entirely new issue altogether seeking to frame fresh issues

on the ground of "change in circumstances". Change in circumstances according to Defendant No.8 is the surfacing of the alleged Will of Tulshiram Mantri which should now be taken into cognizance by the Executing Court in Final decree Application and Defendant No.8 should be permitted to lead evidence thereon. If Petitioner – Defendant No.8 had knowledge of the alleged Will and then to bring it on record after almost 50 years from the making of the Will, after almost 46 years from the date of the demise of his father and after exhausting the hierarchy of the Courts, then such approach of the Defendant No.8 is stained with a vice of gross delay and laches and absolutely no due diligence.

25. The question before the Court is whether the Executing Court can modify the decree or not. The answer to this question is a clear "NO". Once the Defendant No.8 abandoned the proceedings after the Second Appeal stage / Review proceedings and accepted the decree of partition, the execution proceedings of the said partition decree cannot be altered or modified by the Executing Court. Hence, the request made by Mr. Totala stands rejected.

26. In the facts of the present case once the Defendant No.8 has not appealed against the judgment passed in the Second Appeal by this Court and has accepted the partition decree, hence the Final decree has to be in conformity with partition decree only. Hence in view of

the above discussion, I do not agree with any of the propositions advanced by Mr. Totala. The impugned order deserves to be upheld and has been correctly passed. No interference whatsoever is called for therein. In view of the fact that it is Defendant No.8's own case as stated in the letter dated 07.08.2019 to his Advocate about the alleged Will, that according to his knowledge and information, his father had prepared his Will a few years before his demise and may have registered it and he was searching for the same for innumerable years / period of time and most importantly the same not having been disclosed in any of his previous pleadings, until for the first time in 2019, the case of Defendant No.8 cannot be countenanced and deserves to be dismissed with exemplary costs. In view of my above observations and findings, Petitioner - Defendant No.8 is directed to pay costs of Rs. 25,000/- to the Kirtikar Law Library, High Court, Mumbai within a period of four weeks from today. Order dated 24.11.2022 is upheld and confirmed. Petitioner is directed and restrained from creating any obstruction on the suit property to the detriment of the Respondents. Petitioner is directed by this Court to immediately remove the 5 old / discarded four wheelers / cars which he has placed on the suit property as per Exhibit "X-5" within a period of one week from today, failing which the RTO of Nashik is directed by this Court to remove the same from the suit property at the costs of the Petitioner on presentation of a server copy of this judgment by the

Respondents.

27. Learned Executing Court shall proceed with the execution proceedings of the Partition Decree strictly in accordance with the law without any further delay.

28. With the above directions, the Writ petition is dismissed.

29. Interim Application (St.) No.14698 of 2024 is filed in the course of and during the pendency of Writ Petition No.2526 of 2023 by Petitioner seeking directions from this Court to initiate appropriate proceedings under Section 340 of the Code of Criminal Procedure, 1973 against Respondents for giving false evidence in the present Writ Petition in the form of written submissions.

30. It is contended by the Writ Petitioner that pursuant to culmination of final arguments before this Court on 30.04.2023 when this Writ Petition was part heard, Respondents submitted written submissions wherein in paragraph Nos.2(b) to 2(c) it was stated that no reply was received by the Respondents to their Application made to the Sub-Registrar of Assurances, Nashik seeking certified copy of the alleged Will of the deceased and that Application dated 31.03.2023 had not been replied to.

31. According to the Writ Petitioner, this statement is false since Respondents had received a copy of the alleged Will which was given

to them by the office of Sub-Registrar of Assurances – 2, Nashik-1 on 20.07.2023. He has drawn my attention to page No.20 of the Interim Application which is the letter and reply issued by the Sub-Registrar of Assurances to Respondent No.2 to deposit necessary charges with the office of Sub-Registrar, if she desired to have a copy of the alleged Will registered under serial No.922/1970. He would draw my attention to the endorsement made on the said letter which is hand written and which reads that certified copy of the said Will has been received and that endorsement is acknowledged by one Advocate called Mantri and presumably it is the Respondent No.10 whose name is Advocate Kusum T. Mantri, who is an Advocate. It is contended that by virtue of such submissions, Respondents attempted to prejudice to the mind of the Court and intended to obstruct the course of justice in order to obtain a favourable outcome out in their favour by making false submissions. The said Application is vehemently objected to by the learned Advocate appearing for the contesting Respondents.

32. At the outset, it needs to be stated that on 31.03.2023 Respondent No.10 made an Application under the Right to Information Act, which Application is placed at Exhibit "C" – page No.17 of the Interim Application to which she received a reply from the office of Sub-Registrar Assurances on 27.04.2023 which is appended at page No.18 of the Application. In that reply, the Sub-Registrar informed Respondent No.10 that only after she deposits the minimum amount as

required for taking search of the concerned document in the record maintained by the Sub-Registrar of Assurances, the same shall be made available to her.

33. Thereafter the letter dated 20.07.2023 appended at page No.20 of the Interim Application shows the reference and endorsement of Respondent No.10 as having received a certified copy of the Will. The only allegation which is stated by the Writ Petitioner is that Respondent Nos.1, 2 and 10 through their Advocate made a false submission to the Court.

34. *Prima facie*, from the record made available, it is seen that after the initial Application was made by Respondent No.10 on 31.03.2023, the Sub-Registrar of Assurances sent a reply to her wherein it was categorically stated that if she desired to take search of any document, then she would have to deposit the minimum amount required for taking such search as per the statutory requirement, upon which she would be granted inspection. It was also submitted that if she was aggrieved with the said reply, then she could file statutory Appeal before the Appellate Authority also. It is seen that by letter dated 27.04.2023 addressed to Respondent No.10 she was informed that copy of the Will was found in the record of the Sub-Registrar's office at serial No.922/1970 and she should deposit the necessary amount with the office of the Sub-Registrar of Assurances to seek

certified copy of the same. It *prima facie* appears that on 20.07.2023 copy of the Will was infact made available to her in the office of Sub-Registrar of Assurances after she paid the charges. Be that as it may, if that is the case, then there can be no reason to allege that copy of the Will was given to all Respondents and that they made a false statement. I do not reckon that any false submission is made to the Court and the Application filed by Petitioner is one more attempt at pressuring not only the Respondents but also this Court.

35. The Interim Application is meritless and cannot be countenanced. It is nothing but a pressurizing tactic for reasons best known to the Petitioner who has filed the said Application. It is infact the Petitioner who has all along suppressed the facts and circumstances of retrieving of his father's Will from the Executing Court as also this Court and it is he who deserves to be punished and penalised.

36. Interim Application is dismissed.

[MILIND N. JADHAV, J.]

Ajay

AJAY TRAMBAK UGALMUGALE

Digitally signed by AJAY TRAMBAK UGALMUGALE
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