

**(1975) 09 BOM CK 0021**

**Bombay High Court**

**Case No:** Letter Patent Appeal No. 91 of 1973

Keshav Ramchandra Malear

APPELLANT

Vs

Ramdas Dasharath Malekar and  
Others

RESPONDENT

---

**Date of Decision:** Sept. 30, 1975

**Acts Referred:**

- Limitation Act, 1963 - Article 136

**Citation:** AIR 1976 Bom 330

**Hon'ble Judges:** Shah, J; Sawant, J

**Bench:** Division Bench

**Advocate:** R.A. Jahagirdar, for the Appellant; L.G. Khare, for the Respondent

---

### **Judgement**

Sawant, J.

This letters patent appeal is filled against the decision dated 2-4-1973 of the single Judge in First Appeal No. 366 of 1972.

2. The plaintiff had filed a suit being Suit No. 25 of 1947 in the Court of the Civil Judge, Senior Division, Satara for partition of agricultural and non-agricultural property against his brothers claiming that the property was a joint family property. In that suit, a preliminary decree was passed on 4-8-1949 declaring the shares of the respective parties. Against the said preliminary decree, the matter was carried in First Appeal No. 647 of 1949 which was decided on 29-7-1953, by which decision the preliminary decree was confirmed. Thereafter, the plaintiff filed an application which was styled as Special Darkhast NO. 22 of 1954 on 13-4-1954 praying for two relief"s. The first relief was for determination of their shares in the non-agricultural property involved in the suit were houses. On 4-3-1955, the Court passed an order on the said application whereby defendants NOs. 2 to 5 were given 10 khans of structure in the front portion of one house, and Rs. 50/- as compensation to be recovered from defendant No. 6. It was also declared by the said order that defendants Nos. 2 to 5

had one-third share in the well in the property in question. Thereafter on 21-9-1955, the final decree was drawn in terms of the shares which were determined by the order dated 4-3-1955, and it was also directed in the said final decree that the sale deed be drawn on a non-judicial stamp paper. Nothing happened for a long time thereafter. Since the respondents-defendants Nos. 2, 4 and 5 did not get possession of their shares as determined by the order dated 4-3-1955 which was finally incorporated in the final decree dated 21-9-1955, the respondents-defendants Nos. 2, 4 and 5 made an application on 25-2-1972 for separate possession of their shares as were determined earlier. It is their application which has given rise to this appeal. The appellant-heir of original defendant No.1 who is in possession of the shares which had been allotted to defendants Nos. 2 to 5 objected to this application on the ground that the said application was an application for execution of the final decree dated 21-9-1955 and the same having been time barred, no execution could proceed. The learned trial Judge by his order dated 12-4-1972 held that the application for execution was in time and rejected the objection of the appellant. Against the said decision, the appellant preferred an appeal being First Appeal No. 366 of 1972 to this Court which was disposed of by the learned single Judge by his impugned order holding that the final decree dated 21-9-1955 did not declare any new rights or interests of the parties. The original application filed by the plaintiff being Special Darkhast No. 22 of 1954 on 13-4-1954 was an application for execution of the preliminary decree. The present application was not an application for execution but an application in the said darkhast proceedings and the respondents-defendants Nos. 2, 4 and 5 were entitled to continue the said Darkhast proceedings initiated by the said Special Darkhast No.22 of 1954 by the present application, and therefore the proceedings were not time barred.

3. Mr.Jahagirdar who appears for the appellant-heir of the original defendant No. 1 in this appeal. urged before that there could not be execution proceedings before the final decree was drawn up and as such the application made by the plaintiff on 13-4-1954 was not an application for execution and it was wrongly numbered as a Special Darkhast. According to him, the application for execution could be made only after the final decree was drawn up. The first time such an application was made by respondents Nos. 1, 2 and 3 --- defendants Not, 2,4 and 5 was on 25 - 2 - 1972 and the same was clearly time barred and therefore it was not maintainable we find that to accept Mr. Jahagirdar"s said contention will be the place a very narrow interpretation on the expression " Application for execution " whether a particular application in an application for execution of not will depend upon the facts and circumstance of each case. It is also not correct to say that no application for the execution of a preliminary decree can be made in any case, because whether a preliminary decree. In the present case, admittedly the preliminary decree dated 4 - 8 - 1949 had declared the shares of the respective parties in the suit properties including the non-agricultural properties. The plaintiff had therefore made an application on 13-4-1954 which was numbered as Special Darkhast No. 22 of 1954

praying therein for a partition of the non agricultural properties by metes and bounds and for separate possession, after such partition. By the order dated 4-3-1955, the court in terms declared that the various items in the suit properties were put to the shares of the respective parties. Since the final decree was not drawn up till that time, the Court could not grant the second prayer in the said application viz., putting the parties in possession; of the items which are allotted to their shares. The final decree was drawn up only on 21-9-1955. Therefore a part of the prayer in the application dated 13-4-1954 remained to be granted and it could not be said that the said application was finally disposed of by the order dated 4-3-1955. Unless and until there prayer viz., the prayer for separate possession of the property allotted to the shares of the respective parties was granted it could not be said that the application dated 13 - 4 - 1954 had come to be finally disposed of. In this view of the matter the parties were required to request the Court to grant the second prayer in the said application dated 13 - 4 - 1954 and when respondents Nos. 1,2 and 3 -- defendants Nos. 2, 4 and 5 by their application dated 25 - 2- 1972 requested the Court to grant them separate possession of the property allotted to their share by the order dated 4 - 3 - 1955, they were doing nothing more that pursuing the second prayer made in the application dated 13 - 4 - 1954. We are therefore in agreement with the finding of both the trial court as well as the learned Shingle Judge that the application for execution was made on 13 -4 1954 when the Special Darkhast No. 22 of 1954 came to be filed and the said Darkhast application was only partly disposed of on 4 - 3 - 1955 when the court declared the specified properties falling to the shares of the respective parties. At that time the court could not grant the second prayer in the said darkhast application since the final decree was not drawn up only after 21 - 9 - 1955. The application made by respondents-defendants Nos. 2,4 and 5 on 25 - 2 -1972 was only in continuation of the said Special Darkhast No. 22 of 1954 requesting the court to grant them the second prayer which prayer was already made in the said darkhast application. In this view of the matter, it cannot be said that the proceedings for granting separate possession to the respondents - defendants Nos. 2,4 and 5 were time barred. We there fore do not find any substance in this letters patent appeal and dismiss it with costs. The record and proceeding in this matter which have come to this Court may be sent to the trial Court forthwith

4. Appeal dismissed.