

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 01ST MARCH, 2022
PRONOUNCED ON : 08TH MARCH, 2022

JUDGMENT : -

1. By this petition under Article 227 of the Constitution of India, the petitioners have impugned an order dated 29.01.2019 passed by the Jt. Civil Judge Senior Division, Aurangabad, below Exh. 130 in Civil M.A. No. 836/2014, by which the learned Judge had rejected the report of the Court Commissioner appointed for effecting partition of the suit properties amongst the petitioners and respondents.

2. The case has a chequered history, however, relevant facts germane for decision of the petition can be stated as follows :

. Petitioners are the legal heirs of deceased Basant Singh, who was original plaintiff in Special Civil Suit No. 50/71. Respondents are the legal heirs of original defendant no. 2, namely, Avatar Kaur. Special Civil Suit No. 50/71 filed by the petitioner/original plaintiff came to be decreed by virtue of a preliminary decree passed by Civil Judge Sr. Division on 24.12.1999. The operative part of the judgment is extracted below.

“ORDER

1. The suit is partly decreed.
2. It is declared that the plaintiff and defendant no. 2 Autarkaur have 1/6th share each in the properties bearing Municipal No. 5-5-26 and 5-5-29 (purchased vide three sale deeds at Exhs. 339 (6608 sq.yards), 716 (141 x 22 sq.feet), 998 (4367 sq. yards).
3. It is ordered and decreed that the above referred properties shall be partitioned by appointment of a Court Commissioner on the application of the plaintiff and the plaintiff's 1/6th share shall be separated by metes and bounds and the defendant is directed to handover such 1/6th share in the above referred properties as shall be determined by the Court Commissioner and shall be directed by the Court.
4. On the application of the plaintiff, an enquiry into mesne profits in respect of the plaintiff's share shall be held for the period from three years prior to the date of suit till the delivery of the possession. For such enquiry due regard shall be given to the fact that the plaintiff is also occupying some rooms and the part of the plot bearing no. 5-5-29.
5. The plaintiff's suit for partition and separate possession of the remaining properties and for rendition of accounts is hereby dismissed.
6. It is ordered and decreed that the plaintiff shall pay to the defendant no. 1 compensatory costs of Rs. 3000/- for making partly false and vexatious claim. Parties shall bear their normal costs.
7. Preliminary decree shall be drawn up accordingly.

Dt: 24.12.1999

Sd/-
4th Jt. Civil Judge (S.D.),
Aurangabad.”

3. Undisputedly, the preliminary decree by which respective shares of the parties declared by the trial Court has been maintained till the Supreme Court.

4. It is the matter of record that during the pendency of the Second Appeal before this Court bearing Nos. 644/2004 and 171/2005, a compromise had been entered into by the parties, pursuant to which, by an order dated 01.04.2014, this Court had recorded the compromise which includes relinquishment of certain rights by the original plaintiff and defendant no. 1 amongst each other.

5. Since the decree attained finality, a Court Commissioner came to be appointed in the Execution Proceedings No. 38/2014. Subsequently, the said proceedings were converted to MARJI No. 836/2014 for finalization of the decree. An application was moved by respondent no. 1 below Exh. 49, for appointment of a Court Commissioner. By an order dated 01.04.2016 in MARJI No. 836/2014, a Court Commissioner was appointed. The Court Commissioner had submitted a report at Exh. 88, dated 31.05.2016. The petitioner, however, raised an objection to the said report which is at Exh. 99. The learned Judge rejected the report Exh. 88 by an order dated 21.07.2017.

6. The respondent thereafter moved another application below Exh. 115, *inter alia* praying for re-issuance of writ to the Court

Commissioner. By an order dated 15.12.2017, the learned Civil Judge Sr. Division granted the application below Exh. 115 in MARJI No. 836/2014. The Court Commissioner carried out the work of Commission and tendered his report below Exh. 130, dated 09.07.2018.

7. The petitioners have brought to the notice of this Court that reservation in respect of the property at Site No. 310 for parking, Site No. 310-A for garden, and Site No. 311 for 9 meter wide road on northern as well as southern part of reservation No. 310 came to be released by this Court in Writ Petition No. 4091 of 2017 dated 11.09.2017.

8. It is the contention of the petitioners that the respondent no.1 had unnecessarily objected even the second report submitted by the Court Commissioner. By an order dated 29.01.2019 passed below Exh. 130, the learned Judge once again set aside the report of the Court Commissioner. This is the order, which has been impugned by way of this petition mainly amongst following grounds.

. The learned Counsel for the petitioners while reiterating the grounds in the petition vehemently argued that the Court Commissioner appointed by the Court had carried out the work of

Commissioner and submitted a report as per the direction given in the order and, therefore, there was no reason to reject the same. The learned Counsel would argue that the Court below ought to have considered that the proceedings are filed for finalization of a decree and that they are not the execution proceedings. After the finalization of a decree, executable decree can be drawn and such final decree is always subject to challenge as per the provisions of the Code of Civil Procedure. He submits that before that stage is reached, the proceedings are obstructed by respondent no. 1 even before drawing a final decree. The Court below, therefore, exceeded in its jurisdiction while passing the impugned order which deserves to be quashed and set aside. The Counsel would further submit, that specific directions have been issued by the trial Court while passing a preliminary decree as to the manner in which the partition is to be effected amongst the plaintiff and defendants. Such directions cannot be altered by a Court finalizing a decree. The Counsel would submit that the directions issued by the Court below to the Court Commissioner are unknown to law and the Court finalizing a decree cannot go beyond the preliminary decree drawn by a Civil Court.

9. I have gone through the written synopsis tendered by the Counsel for the petitioners. At the outset, it is the contention of the

Counsel for the petitioners that the order impugned is without jurisdiction in view of the Order XXVI Rule 13 & 14 of the Code of Civil Procedure. Rule 13 & 14 of Order XXVI need not be reiterated as the position of law is very much clear. Even if it is argued by the Counsel that the directions issued by the executing Court are beyond the scope of original decree, I am afraid, this argument cannot be accepted for the reasons stated hereinafter. Most of the submissions of the Counsel are in the form of challenging the order on merits which, this Court cannot go into the same as this Court is not sitting in appeal over the said order. The Counsel would argue that the initial report Exh. 88 and the impugned report Exh. 130 have given effect to the direction issued by the trial Court. If such reports are objected even before the scrutiny and examination of Court Commissioner, the decree will not attain finality. The Counsel, therefore, prays for quashing the impugned order being perverse and illegal.

10. Per contra, the learned Counsel for the respondents while taking strong objection to the arguments raised by the petitioners' counsel invited my attention to the record and proceedings as well as various documents and has supported the impugned order. At the outset, the learned Senior Counsel would argue that it is very much

essential to measure the plots in question as per the sale deeds and then to effect partition. Unless shares are carved out *qua* the respective parties, partition cannot be effected. The learned Senior Counsel would argue that the City Survey Officer committed a blunder in relying upon the city survey record and not upon the sale deeds. He submits that each of the sale deeds describes all the details which are sufficient to carve out the respective shares of the parties. He, therefore, submits that there is no reason to interfere with the impugned order passed by the Executing Court.

11. With the assistance of the learned Counsels for the parties, I have meticulously gone through the record as well as the impugned order.

12. At the outset, Order XXVI Rule 13 of the Code of Civil Procedure contemplates as to how in a preliminary decree for partition, the Commission can be effected for partition of immovable property. The law is no more *res integra* on the aspect as to how Commission is to be effected in respect of partition of immovable property. There can be no hard and fast rule laid down while effecting partition of joint family properties. While effecting partition of joint family properties, it may not be possible to divide any

property by metes and bounds. The allocation of properties of unequal value may come to the share of a member of a joint family at the time of effecting partition but for that necessary adjustments have to be made. Sometimes, it may also happen that some of the co-sharers on partition may not get any share in immovable property. Therefore, there cannot be any hard and fast rule laid down in that regard. It depends upon the facts and circumstances of each case. It also depends upon the nature of immovable property and the number of such properties as also the number of members amongst who it is required to be divided. Sometimes, it also happen that properties of a larger value may go to one member. Property of a lesser value may go to another. What is necessary is the adjustment of the value by providing for payment by one who gets property of higher value. The Supreme Court in a case of M. L. Subbaraya Setty (Dead) by LRS. and others Vs. M. L. Nagappa Setty (Dead) by LRS and others reported in (2002) 4 SCC 743, reiterated the position of law in respect of partition of immovable properties through the Court Commissioner.

13. In the impugned order, the learned Civil Judge Sr. Division observed that though the Commissioner had determined $1/6^{\text{th}}$ share by demarcating four boundaries as per sale deeds, yet the area

Survey No. 17355 does not tally with that of sale deed. Since there is no clarification on that aspect, the learned Judge rejected the report of the Court Commissioner.

14. Having gone through the impugned order meticulously, I do not find that any interference is warranted in the same. The order impugned is sans any perversity or illegality. The executing Court had properly exercised its jurisdiction vested in it.

15. The powers of this Court under Article 227 of the Constitution are wide and the main object of it is to keep strict administration and judicial control on the administration of justice. Just because a party seeks to challenge an order of a subordinate Court merely due to some insignificant errors on facts, the discretionary powers cannot be exercised. Consequently, the petition is devoid of merits and hence stands dismissed.

16. The executing Court and the parties thereto shall not unnecessarily delay or protract the execution. It is expected of the executing Court to make an endeavour to conclude the same, as expeditiously as possible and in any case within three (03) months from the date of receipt of this order, in accordance with law.

17. Petition stands disposed off in terms of the aforesaid directions.

[PRITHVIRAJ K. CHAVAN]
JUDGE

SG Punde