

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7942 OF 2017

NANDKUMAR S/O SHANKARRAO RASNE
VERSUS
DHARMAVIR S/O GOVIND MADAN DIED THROUGH LRS AND
OTHERS

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Mr. V. P. Latange, Advocate for the Petitioner.
Mr. A. K. Gawali, Advocate for Respondent Nos. 1A to 1C.
Mr. M. K. Bhosale, Advocate for Respondent Nos. 2A to 2C.
Mr. S. V. Natu h/f Mr. A. R. Kale, Advocate for Respondent Nos.
3A to 3D

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CORAM : V. K. JADHAV, J.
RESERVED ON : 26th APRIL, 2018
PRONOUNCED ON : 3rd MAY, 2018

ORDER :-

1. Heard finally with consent at admission stage.
2. By way of present Writ Petition, the petitioner is challenging the legality and validity of order dated 27.04.2017 passed by 5th Joint Civil Judge, Senior Division, Ahmednagar, thereby allowing the application below exhibit 91 filed by the respondent/plaintiff in Final Decree Application No. 6/2010.
3. Brief facts giving rise to the present Writ Petition are as follows:

a) The petitioner had filed Regular Civil Suit No. 632 of 1983 against the respondent Dharmavir Govind Madan for eviction from the tenanted premises that is a three storied building. The said disputed property i.e. the three storied building is situated at M.G. Road, Ahmednagar bearing City Survey No.3349, Municipal House No. 2542 having area of 181.4 sq. meters. The trial court, by judgment and decree dated 15.04.1999, decreed the suit directing the respondents to hand over possession in favour of the petitioner. Being aggrieved by the same, the respondent/Girish Madan had filed Regular Civil Appeal No. 229 of 1999 in the District Court and the learned District Judge was pleased to dismiss Regular Civil Appeal No. 229 of 1999 thereby confirming the judgment and decree of eviction passed by the trial court dated 15.04.1999. The respondent/Girish Madan had filed Writ Petition No. 2263 of 2003 in this Court challenging the aforesaid order passed by the appellate court confirming the judgment and decree of eviction passed by the trial court. This Court has partly allowed Writ Petition No. 2263 of 2003. This Court has dismissed the prayer of the respondent/Girish Madan to set aside the decree, but protected his possession till the outcome of Regular Civil Suit No. 890 of

2000 (old Special Civil Suit No. 67/1995).

b) The respondent/original plaintiff had filed Regular Civil Suit No. 890 of 2000 in the Court of Civil Judge, Junior Division, Ahmednagar for declaration and partition of the suit house. It has been pleaded in the said suit that the respondent/Girish Madan had purchased $3/7^{\text{th}}$ share from the suit property though there was no partition between the family members of the petitioner. The trial court, by judgment and decree dated 06.12.2004 in Regular Civil Suit No. 890 of 2000 (old Special Civil Suit No. 67 of 1995) has partly decreed the suit and declared that respondent/Girish Madan is having $3/7^{\text{th}}$ share and the defendant no. 3/Jamnadas Bhagwani (respondent no.3 herein) is having $2/7^{\text{th}}$ share and the defendant no.1 (present petitioner) and deceased defendant no.2 Ramakant Shankar Rasne are having $1/7^{\text{th}}$ share each in the suit property. The trial court has also directed that $1/7^{\text{th}}$ share of deceased defendant no.2 shall devolve amongst defendant nos. 2A to 2D (legal heirs of deceased defendant no.2). The trial court has further directed that the actual partition and separation of shares declared above shall be made by appointing an expert Court Commissioner vide

Order 26 Rule 13 of the Code of Civil Procedure, 1908 (CPC). The trial court has declared that the sale deed dated 08.05.2000 executed by Suresh Shankarrao Rasne in favour of defendant no.1 (present petitioner) is illegal, null and void and not binding and accordingly dismissed the counter claim of defendant no.1. The trial court however directed by clause (8) of the operative part of the order that the prayer of the plaintiff and defendant no.3 to allot the portion of the suit property already occupied by them to their respective shares is rejected.

c) Being aggrieved by the same, the petitioner alone has preferred appeal before the District Court bearing Regular Civil Appeal No. 9 of 2005. The learned District Judge has partly allowed the appeal filed by the present petitioner and set aside the decree of the trial court to the extent of the observation in respect of setting aside the sale deed executed by Suresh Shankarrao Rasne in favour of the petitioner. Being aggrieved by the allotment of 3/7th share to the respondent/Girish Madan and 2/7th share to Jamnadas Bhagwani, the petitioner has preferred Second Appeal No. 611 of 2010 before this Court. This Court, by judgment and order dated 30.06.2016, has dismissed the said

Second Appeal No. 611 of 2010. Being aggrieved by the same, the petitioner has filed Special Leave Petition (C) No. 23772 of 2016 before the Apex Court, which is pending, challenging the allotment of shares to the respondent despite purchasing the share of Girish Madan by the petitioner.

d) Meanwhile, the petitioner has filed Regular Darkhast No. 175 of 2003 in the eviction decree and also filed an application Exhibit 117 for issuance of possession warrant against the respondents. The executing court was pleased to dismiss the said application by order dated 27.01.2015. The petitioner had filed Writ Petition No. 6249 of 2015 before this Court. By order dated 17.11.2015, this Court has allowed the said Writ Petition and thereby directed the executing court to issue possession warrant. The respondent Girish Madan had filed review petition which came to be dismissed by this Court. Being aggrieved by the same, respondent/Girish Madan has filed Special Leave Petition before the Apex Court thereby challenging the order passed by this Court dated 17.11.2015 in Writ Petition No. 6249 of 2015. However, by order dated 05.08.2016, the Apex Court was pleased to dispose of the said Special Leave Petition thereby

directing the executing court to appoint the Court Commissioner in the final decree proceedings identifying the respective shares.

e) The respondent Girish Madan had filed Final Decree Application No. 6/2010 for partition and possession of his 3/7th share in view of the partition decree passed in the suit as referred above. He had also filed application below Exhibit 42 for appointment of Court Commissioner. By order dated 07.09.2016, the executing court was pleased to appoint an Advocate as Court Commissioner. The present petitioner has challenged the said order of appointment of Court Commissioner by filing Writ Petition No. 11591 of 2016 before this Court. This Court has disposed of the said Writ Petition with liberty to take objection at an appropriate stage. The said Advocate/Court Commissioner has submitted his report on 17.12.2016 before Civil Judge, Senior Division, Ahmednagar/executing court. The learned Commissioner has divided the property into the shares as directed by the order vide which the commission was issued and further suggested to allot shares to the parties in terms of the said report. The present petitioner has raised objection to the said Commissioner's report mainly on the ground that the Court

Commissioner has granted the same share which is refused by the trial court by clause (8) of the operative part of the judgment and decree dated 06.12.2004 in Regular Civil Suit No. 890 of 2000. The petitioner has specifically raised a ground that the allotment of same share is contrary to the clause (8) of the decree passed by the trial court.

f) The learned Civil Judge, Senior Division, Ahmednagar, by impugned order dated 27.04.2017 in final decree application no. 6/2010, has passed the following order:

- “1. The application is allowed with costs.
2. An area of 69.68 Sq. meters situated in the northern side in the eastern portion of the suit property, having south-north length of 15.1 feet and east-west width of 49.7 feet is allotted towards 3/7th share of the original plaintiff i.e. present applicant.
3. An area of 46.52 sq. ft. situated in northern side of eastern portion of the suit property, which is having 8 feet width in south-north direction and 53 feet length in east-west direction in “L” shape is allotted towards 2/7th share of original defendant no.3 i.e. present opponents no. 3A to 3D jointly.

4. An area of 32.55 Sq. feet situated in northern side of western portion of the suit property having south north width 15.5 feet and east west length of 22.6 feet is allotted towards 1/7th share of defendant no.1 i.e. opponent no.1.
5. Area of 32.55 sq. feet situated in south side of western portion of the suit property having length of 28.5 feet in east west direction and the width of 8 feet in south north direction in "L" shape is allotted towards 1/7th share of original defendant no.2 i.e. opponent no. 2A to 2D4 jointly.
6. The above areas are allotted as per the rough sketch map annexed as Appendix 'A' to the Court Commissioner report exh. 64.
7. Final decree be drawn up in above terms after payment of requisite Court fees by the applicant and opponent no.1, opponent no. 2A TO 2D4 and opponent no. 3A to 3D towards their respective shares.
8. Dictated and pronounced in open Court."

Hence this Writ Petition.

4. The learned counsel for the petitioner submits that the executing court has not considered the judgment and decree

passed by the trial court in Regular Civil Suit No. 890 of 2000, especially clause (8) of the operative part of the order wherein the trial court has rejected the specific prayer of the respondent/decree holder and respondent/defendant no.3 for allotment of the share which was occupied by them as tenanted. The learned counsel submits that the executing court has allotted the same portion to respondent/decree holder contrary to the judgment and decree passed in Regular Civil Suit No. 890 of 2000. The learned counsel for the petitioner submits that the Court Commissioner is not an expert person in the field. The executing Court ought to have appointed proper person from the City Survey office as a Court Commissioner so as to identify the correct position/share in the suit property. Thus, the executing court has committed an error in allotment of the shares by passing final decree only on the basis of the report submitted by the incompetent Court Commissioner. The said Court Commissioner is an Advocate by profession. The learned counsel submits that the share which is allotted by the Court Commissioner to the respondent is a prime and more valuable share as compared to the share allotted to the petitioner and other respondents and as such, there is no equitable partition.

The learned counsel submits that all three shares, that is 3/7th share, are sold out to the petitioner by respondent/Girish Madan by sale deed dated 21.12.2004 and therefore, respondent/Girish Madan is not entitled for possession of 3/7th Share in the suit property. The respondent/Girish Madan has suppressed this material fact and thus, considering his conduct, the Final Decree Application No. 6/2010 ought to have been dismissed by the executing court. The learned counsel submits that the share which has been allotted to the respondent/Girish Madan ought to have been allotted to the petitioner by the Court Commissioner.

5. The learned counsel for respondent nos. 1A to 1C submits that the trial court, while disposing of Regular Civil Suit No. 890 of 2000 was conscious of the fact that while passing the preliminary decree, the prayer of the plaintiff i.e. the predecessor of respondent nos. 1A to 1C and defendant no.3 i.e. the predecessor of respondent nos. 3A to 3D to allot them the tenanted premises in their possession, would take away the rights of other co-sharers to have equitable partition. In view of the said fact, the trial court had directed specifically to conduct partition by appointing Court Commissioner under Order 26

Rule 13. The learned counsel submits that by any stretch of imagination, the same cannot be held as a hurdle or prevent the executing court from passing final decree by effecting equitable partition considering the report of the Court Commissioner. The learned counsel submits that the Hon'ble Apex Court, while disposing of Civil Appeal Nos. 7313-7314/2016 (Special Leave Petition (C) No. 3250-3251 of 2016), has directed that the executing court should take steps to appoint Court Commissioner in the final decree proceedings (Final Decree Application No. 6/2010) filed by respondent nos. 1A to 1C for execution of the judgment and decree passed in R.C.S. No. 890 of 2000, so as to identify the respective shares of the parties.

6. The Apex Court, in the meantime, has stayed the eviction proceedings as against the respondent nos. 1A to 1C with a clarification that the Special Leave Petition filed against the judgment in Second Appeal No. 611 of 2010 shall have no bearings on the execution (eviction) proceedings. The learned counsel submits that the Apex Court was of the view that the equitable partition should be made amongst the petitioner and the respondent. Though the petitioner has challenged the order

passed by the Civil Judge Senior Division, Ahmednagar, thereby appointing Advocate Mr. C.D. Kulkarni as Court Commissioner, by filing Writ Petition No. 11591 of 2016, this Court has rejected the said Writ Petition. The petitioner is now precluded from raising the contention again that the incompetent Court Commissioner has been appointed to suggest equitable partition. The learned counsel submits that the Court Commissioner has specifically observed that the width of the property is very small and therefore, it was not possible to carve out seven east-west shares in the suit property. The learned Court Commissioner has accordingly carried out equitable partition based upon the valuation of the property facing M.G. Road and Karachiwala lane which were both commercial properties. The Court Commissioner had also given proposed map of partition alongwith the maps showing the actual possession of the petitioner and the respondents. Respondent nos. 1A to 1C, 3A to 3D and respondent nos. 2A to 2C have given their no-objection to the partition as suggested by the Court Commissioner and consequently, the final decree came to be passed by the executing court on 27.04.2017. The Court Commissioner has made every endeavour to conduct equitable partition by

considering possession of the parties, valuation of the property in their respective possession and also the fact that the petitioner is also in possession of the commercial properties as detailed in the report. The learned counsel submits that the partition suggested by the Court Commissioner cannot be termed as inequitable.

7. The learned counsel further submits that the conduct of the petitioner in misleading the executing court in the eviction decree proceedings by impressing upon the court that the order dated 05.08.2016 passed by the Apex Court was only till the submission of report by the Court Commissioner, and suppressing the order passed by this Court in Second Appeal No. 611 of 2010, wherein the eviction proceedings are stayed till the actual partition, dis-entitled the present petitioner from equitable relief. Thus, against violation of the order passed in Second Appeal No. 611 of 2010, the respondent/Girish Madan has filed Contempt Petition No. 219 of 2017 and the same is pending before this Court. The respondent nos. 1A to 1C also filed Contempt Petition (C) No. 649-650 of 2017 before the Apex Court and the Apex Court, while disposing of the Contempt Petition, directed the executing court to dispose of the final

decree proceeding no. 6/2010 expeditiously and preferably within a period of three months from the date of production of order. Though the Hon'ble Apex Court has not taken any contempt action against the petitioner, but has specifically directed as, "needless to say, the fact that the petitioner has dispossessed shall not be a factor for the final decree court passing appropriate orders in the light also of the report of the Court Commissioner". The learned counsel submits that so far as the objections that the predecessor of respondent nos. 1A to 1C has sold out the property by virtue of the sale deed dated 21.10.2004, the suit has been instituted for declaration that the sale deed is fraudulent and null and void. The said suit is pending and the executing court has also considered the aforesaid objection holding that the objectors are the wife and son of the petitioner and ultimately even if they succeed, they would not be entitled to the share allotted to respondent nos. 1A to 1C. The learned counsel submits that after considering the grievance of the petitioner and on appreciation of the Court Commissioner's report, the executing court, after applying mind as to the correctness of the Court Commissioner's report, passed the final decree by the impugned order dated 27.04.2017. The

learned counsel submits that the petitioner is only interested in litigation and prolonging the matter for no reason. Thus, the Writ Petition deserves to be dismissed.

8. The learned counsel for respondent nos. 1A to 1C, in order to substantiate his contentions, has placed reliance on the following case:

Khemchand Shankar Choudhari & Anr. vs. Vishnu Hari Patil & Ors., reported in (1983) 1 SCC 18.

9. The learned counsel appearing for respondent nos. 2A to 2C and for respondent nos. 3A to 3D have also adopted the submissions made by the learned counsel for respondent nos. 1A to 1C.

10. I have carefully considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the petition and the annexures thereto.

11. The suit property is a three storeyed building situated at M.G. Road, Ahmednagar bearing C.T.S. No. 3349 Municipal

House No. 2542 having area of 181.4 sq. meters. It is the ancestral property of the present petitioner, who is defendant no.1 in R.C.S. No. 890 of 2000, and deceased Ramakant Shankar Rasne. After death of Ramakant Rasne, defendant nos. 2A to 2C are substituted in his place as his legal heirs. As per the pleadings of the plaintiff in the said suit, the defendants are having their undivided $1/7^{\text{th}}$ share in the suit property. The entire suit property was owned by deceased Shankar Trimbak Rasne and after his death on 09.12.1970, the suit property came to his legal heirs. It further appears from the pleadings of the plaintiff that the plaintiff's father Dharmavir was the monthly tenant in the suit building at the ground floor. He had run a watch shop till his death and after his death, the plaintiff continued the same business at the same place. The father of plaintiff had purchased overall $3/7^{\text{th}}$ share of Hirabai, Sharad and Suresh, having $1/7^{\text{th}}$ share each, on 18.01.1989 under registered sale deed in the name of the plaintiff Girish Madan. Thus, the plaintiff Girish Madan has become the owner of $3/7^{\text{th}}$ share in the suit building. Towards the southern side of the watch shop of the plaintiff, there is another shop by name 'Maratha Mandir' run by defendant no.3 in the said suit bearing

R.C.S. No. 890 of 2000 as a tenant. He had also purchased 2/7th share of Dattatraya Shankar Rasne and Ramakant Shankar Rasne each under registered sale deed and thus, he has also become owner to the extent of 2/7th share in the suit property. The sisters of defendant no.1 have relinquished their rights in the suit property vide registered deed. The defendant no.1 (present petitioner) had also consented for the transaction entered in favour of the plaintiff. It is also the pleading of the plaintiff that prior to purchase of 3/7th share, the partition had been effected in between the co-sharers and the suit shop of the plaintiff had been allotted to the share of his vendors. However, defendant no.1 (present petitioner) all the while denied the partition and therefore, due to persistent complaints of defendant no.1, the plaintiff was constrained to bring R.C.S. No. 890 of 2000. The present petitioner/original defendant no.1 in the said suit has denied the theory of partition by metes and bounds. The objections taken by the plaintiff and his father in R.C.S. No. 632 of 1983 have been rejected and accordingly, the decree of eviction came to be passed in favour of the petitioner. It is also contention of the petitioner that he is having preferential right to purchase the property sold to the plaintiff being one of the co-

sharers and therefore, he sought counter claim against the plaintiff.

12. On the basis of rival pleadings of the parties to the suit, the trial court in R.C.S. No. 890 of 2000 has framed as many as eight issues and recorded the findings thereon. The trial court, in R.C.S. No. 890 of 2000 has recorded the finding to the issues as follows:

	Issues	Findings
1.	Whether plaintiff prove his ownership over 3/7 th share of suit property?	In the affirmative
2.	Whether Plaintiff further prove that all sisters of defendants No. 1 and 2 have relinquished their share in suit property in favour of all the brothers?	In the affirmative
3.	Whether defendant No.1 prove his ownership up to the extent of 7/12 share in suit property?	In the negative
3A.	Whether defendant No.1 prove that he is having preferential right to purchase the 3/7 th share of his brother-Coparceners sold to plaintiff?	In the negative
4.	Whether defendant No.3 prove his ownership over 2/7 th share of suit property?	In the affirmative
4A.	Whether defendant No.3 prove that sale deed executed by Suresh Shankar	In the affirmative

dated 08.05.2000 is illegal, null and void?

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| 5. | Whether plaintiff further prove that defendants are avoiding to make partition of the suit property? | In the affirmative |
| 6. | Whether the suit is bad for non-joinder of necessary parties? | In the Negative |
| 7. | Whether plaintiff is entitled for the reliefs claimed? | In the partly Affirmative |
| 7A. | Whether defendants No.1 and 3 are entitled for their respective Counter-claims? | In the negative pertaining to Deft. No.1 and partly affirmative pertain to Deft. No.3. |
| 8. | What order and decree? | As per final order. |

13. Being aggrieved by the same, the present petitioner has preferred Second Appeal No. 611 of 2010. This Court, in para 20 of the judgment dated 30.06.2016 has recorded the following circumstances as against defendant no.1 (present petitioner):

“20.

(i) *There is record to show that partition had taken place amongst the brothers of defendant No.1 and defendant no.1 was party to the partition and it had taken place prior to 1989.*

(ii) All the sisters had relinquished their right in the property in favour of all the brothers and due to this circumstance, the six brothers and mother were entitled to get 1/7th share each and accordingly, application was made by defendant No.1 in the year 1990 for entering specific portion of the property in his name. This application was given after the date of sale deed made in favour of plaintiff.

(iii) The circumstance that plaintiff wanted to enter specific portion of the property in his name indicates that he was not treating entire property as dwelling house and he wanted to get separate portion of the property by dividing the property by metes and bounds. He wanted to use his portion separately.

(iv) There is record which was created to show that defendant No.1 had given consent to the transaction made in favour of plaintiff by two brothers of defendant No.1 and his mother. In previous Suit, Civil Court has held that such consent was proved by present plaintiff.”

14. On the basis of the aforesaid observations, this Court in the aforesaid Second Appeal, has observed that the trial court has not committed any error in deciding the matter as against defendant no.1/appellant (present petitioner). This Court has

also observed that there is stay to the execution of the decree of eviction and as such, the execution will be deferred till the actual partition is effected as per the decree passed by the courts below.

15. It is thus clear that in view of dismissal of Second Appeal No. 611 of 2010, the decree passed in R.C.A. No. 9 of 2005 modifying the decree passed by the trial court in R.S.C. No. 890 of 2000 to the extent of the counter claim of the original defendant no.3, the decree passed in R.C.S. No. 890 of 2000 stands merged in the decree passed in R.C.A. No. 9 of 2005. In view of the observations made by this Court while disposing of the Second Appeal as stated above, I do not find any substance in the submission that since the trial court has specifically rejected the prayer vide clause 8 of the operative part of the order passed in R.C.S. No. 890 of 2000, the same share cannot be allotted to the respondents.

16. On careful perusal of the Court Commissioner's report Exhibit 64, I also appreciate the efforts taken by the learned Court Commissioner in preparing the report after studying every aspect of the proceedings. On careful perusal of the Court

Commissioner's report Exhibit 64 and the rough sketch drawn by him which is also part and parcel of the report, I find that the Court Commissioner has suggested equitable partition on the basis of possession of respondent Nos. 1A to 1C over the suit property. It further appears from the sketch that towards eastern side, there is M.G. Road and towards western side there is Karachiwala lane. In view of the decree passed in R.C.S. No. 890 of 2000, $\frac{3}{7}$ th share is declared to the respondent plaintiff, $\frac{2}{7}$ th share is declared for defendant no. 3 and $\frac{1}{7}$ th share each is declared to the present petitioner and deceased defendant no.2. On perusal of the report of the Court Commissioner, it appears that the Court Commissioner has considered the total area of the suit property, value of the property, internal structure and location of the property. As per the description of the suit property, the suit property ad-measures 181.4 sq. meters and as per the sketch map, very small area is available in breadth facing to the road.

17. In terms of order 26 Rule 14 of the Code of Civil Procedure, 1908, the Court Commissioner shall, after such inquiry as may be necessary, divide the property into as many

shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares. In terms of Sub-rule (2) of Rule 14, the Court, after hearing any objections, which the party may make to the report or reports, shall confirm, vary or set aside the same and in terms of Sub-rule (3) of Rule 14, where the Court confirms or varies the report or reports, it shall pass a decree in accordance with the same as confirmed or varied. The learned Judge of the executing court, after considering the objections raised by the present petitioner, confirmed the report submitted by the Court Commissioner and passed the final decree in accordance with the same. I do not find any fault in the impugned order passed by the executing court in Final Decree Application No. 6/2010. On careful perusal of the Court Commissioner's report and the rough sketch prepared by him, I do not find any inequitable partition. I do not find any substance in the submissions made on behalf of the petitioner that the respondents have got more premium location in the house property as compared to the allotment of share to the petitioner.

18. In view of the above discussion, the Writ Petition is liable to be dismissed. Hence the following order

ORDER

I. The Writ Petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

18. At this stage, the learned counsel for the petitioner submits that the interim order passed by this Court in the year 2017 is continued till this date and therefore, the effect of this order may be stayed for a period of six weeks so as to enable the petitioner to approach the Supreme Court.

19. None present for the respondents.

20. Considering the nature of the dispute, the effect of this order is hereby stayed for a period of six weeks from today.

(V. K. JADHAV, J.)