

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMISSIONER'S REPORT DATED 19 DECEMBER 2018
IN
NOTICE OF MOTION NO.2077 OF 2015
IN
EXECUTION APPLICATION NO.1695 OF 2015
ALONG WITH
NOTICE OF MOTION NO.2077 OF 2015
AND
CHAMBER SUMMONS NO.1498 OF 2015
IN
EXECUTION APPLICATION NO.1695 OF 2015**

Rashidabai Allarakha

And Others

Versus

Mehrunnissa Sheikh Abdul Rahim

And Others

... Decree Holders/Claimants

... Judgment Debtors/Respondents

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Mr. Cherag Balsara a/w Ms. Huda Diamondwala i/b Diamondwala & Co.
for the Applicants.

Mr. Akhilesh S. Dubey a/w Mr. Vagish Mishra i/b Mr. Dharmesh S. Joshi for
Respondent No.1.

Mr. S.S. Agate, Commissioner for Taking Accounts present.

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CORAM : S.C. GUPTE, J.

DATE : 7 FEBRUARY 2019

P. C. :

. Heard learned Counsel for the parties on the Commissioner's Report.
The main contest is between the decree-holders/claimants and the
judgment-debtor/Respondent No.1.

2 The commissioner's report seeks confirmation of a sale in respect of the suit property, which forms part of an award. The decree-holders/claimants are purchasers of the suit property in pursuance of sale ordered by this court in execution of the award.

3 The decree-holders/claimants herein ("claimants") and judgment-debtor ("respondent") were partners of the partnership firm of M/s Hotel Sagar. The partnership ran a business of running and conducting guest house, lodging house and hotel in the name of "Hotel Sagar". The disputes arose between the parties in the matter of conduct of this business. One of the matters of contest in these disputes was the claimants' allegation that sons of the respondent were illegally participating in business affairs of the firm without any express or implied authority of the claimants and the respondent siphoned off the firm's funds. An arbitration petition was filed in the circumstances by the claimants seeking protective reliefs under Section 9 of the Arbitration and Conciliation Act, 1996 *inter alia* seeking appointment of Court Receiver. At the hearing of the arbitration petition, this court directed the parties to maintain *status quo* and referred all disputes between the parties to arbitration. It was the case of the claimants that the firm had stood dissolved by notices of dissolution dated 20 February 2009 and 13 May 2009. In view of such dissolution, it was necessary that the respondent be ordered and directed to render true and correct accounts of the firm as also conduct sale of the assets of the firm and distribution of the sale proceeds amongst the partners in the ratios of their respective shares. One of the questions which fell for determination of the learned arbitrator, was whether the land and building along with the basement described in the statement of claims or, any part thereof, was an

asset of the firm of M/s Hotel Sagar and in what manner rendition of accounts and distribution of net assets of the firm should be ordered. On the question of ownership of the land and building of Hotel Sagar, the arbitrator held that the ground floor, first floor, second floor and third floor terrace of the building known as “Hotel Sagar” formed part of the property of the firm and that this property was required to be sold and proceeds thereof to be distributed between the partners in accordance with their respective shares after meeting all expenses of the sale. The arbitrator held that the land as well as the basement forming part of the entire property did not belong to the partnership of Hotel Sagar. The arbitrator's award was challenged by the Respondent before this court. Even the claimants challenged the award to the extent that it did not accept the basement of the building as part of the partnership property. By a common order passed by a learned Single Judge of this court, both arbitration petitions were dismissed. In an appeal from this order, a Division Bench of this court confirmed the order of the learned Single Judge. A Special Leave Petition (SLP) filed by the respondent from the order of the Division Bench was dismissed by the Supreme Court. The SLP of of the decree-holders/claimants is, however, pending. The Supreme Court has issued a notice to the respondent in that SLP. That is where the matter stands as far as the issue concerning the extent of the partnership property is concerned.

4 In the meantime, pending the challenge to the award, on the execution application of the claimants, a learned Single Judge of this court, vide order dated 28 August 2015, appointed commissioner for taking accounts, for effecting the sale of the property in execution of the award. The commissioner for taking accounts, for effecting sale of the property,

appointed M/s AT & TS Associates as valuer of the property. The Valuer submitted its report. Public auction thereafter was fixed after settling the draft terms and conditions of sale as well as proclamation of sale. A notice of public auction generated only one joint bid from the claimants and respondent nos.2 and 3. The offer was for a sum of Rs.21 crores. The commissioner's report seeks directions on whether the offer of claimants and respondent nos.2 and 3 should be accepted and whether sale should be confirmed in their favour *inter alia* by setting off their 93 per cent share in the suit partnership and whether consequential directions should be passed.

5 The directions sought in the report are opposed by Respondent No.1. Learned Counsel for Respondent No.1 in the first place submits that the entire property, namely, the ground floor, first, second floor and third floor terrace do not belong to the partnership of Hotel Sagar. Learned Counsel submits that the claimants' description of the suit property, consistent with the report made by a commissioner, shows that only thirty three rooms forming part of the suit building belong to the firm of Hotel Sagar. Learned Counsel submits that there are as many as thirty eight rooms forming part of the building. Learned Counsel also submits that there is one particular room on the third floor terrace which does not belong to the partnership of Hotel Sagar. Learned Counsel submits that these five rooms and room on the terrace belong to the firm of M/s KGN Trading, which is proprietary firm of Mr. Zulfikar, the son of Respondent No.1.

6 In so far as identity of the property and its ownership are concerned, the matter was squarely in contest before the learned arbitrator and the

arbitrator's decision on such contest forms part of the award. What was claimed before the arbitrator by the claimants was that the entire land and the building standing thereon belonged to the firm of Hotel Sagar. The arbitrator did not accept the claimants' case of ownership of the property by the firm as regards the land and basement of the building. The arbitrator held that the claimants had failed to show that the land and the basement belonged to the firm of Hotel Sagar. The award does not reflect any contest as between the parties as to the number of rooms on the ground, first, and second floor and third floor terrace of the suit building. The case that only thirty three rooms out of thirty eight rooms forming part of the suit building and only the third floor terrace without the room in it were part of the property owned by the firm Hotel Sagar and not five rooms or room on the terrace, is not reflected in the award. The award has been sustained throughout and is today final as regards the property identified by the learned arbitrator, namely, ground, first and second floors and third floor terrace of the suit building as the property of the firm. All these areas can be said to be unequivocally forming part of the property of Hotel Sagar and it was this property, which was put to auction and purchased in auction by the claimants and Respondent Nos.2 and 3 jointly. There is, accordingly, no merit in the submissions of learned Counsel for Respondent No.1 that the property of the firm consists of only thirty three rooms or that the room on third floor terrace does not form part of the suit property.

7 The valuers appointed by the commissioner, in their report, have estimated the value of the property at Rs.16,04,16,000/-. The reserve bid price was accordingly fixed at Rs.16.05 crores under Rule 527 of the High

Court Original Side Rules. Since the price offered jointly by the claimants and Respondent Nos.2 and 3 is well above the reserve bid price and there is no other offer matching the same, there cannot be any serious objection to accept the bid of claimants and Respondent Nos.2 and 3. In any event, no submission is made in this behalf by the contesting Respondent, namely, respondent No.1. There is also nothing pointed out to question the case of the claimants and Respondent Nos.2 and 3 that between them they hold 93 per cent share in the suit partnership. The rest of the prayers sought in the Commissioner's Report dealing with issuance of sale certificate and directions to Sheriff of Mumbai to hand over possession, etc. are ministerial matters, which much follow the acceptance of the bid and confirmation of the sale.

8 Accordingly, the Report dated 19 December 2018, presented by the commissioner for taking accounts is allowed by issuing directions as prayed for in clauses (a) to (e) of paragraph 44 of the report.

9 Whilst implementing this order, and in particular, prayer clause -(c) of the commissioner's report, Sheriff of Mumbai may, if necessary, take help of the local Police Station, namely, Nagpada Police Station, Mumbai, for securing vacant and peaceful possession of the premises. The proceedings for securing such possession and handing it over to the claimants and Respondent Nos.2 and 3 may be videographed.

10 At the request of learned Counsel for Respondent No.1, the Sheriff of Mumbai is directed to act on this order after three weeks from today. In the meantime, Respondent No.1 shall not create any third party rights in

respect of the suit property. Learned Counsel for Respondent No.1 states that so far Respondent No.1 has not created any third party right.

11 In view of the directions passed on the commissioner's report, confirming the sale and directing possession of the suit property in favour of claimants and Respondent Nos.2 and 3, the Notice of Motion and the Chamber Summons do not survive and the same are also disposed of.

(S.C. GUPTE, J.)