

IN THE HIGH Court OF ORISSA AT CUTTACK

CMP NO. 720 OF 2021

Sakuntala Mishra and others ***Petitioners***
Mr. Upendra Kumar Samal, Advocate

-versus-

Jagdeep Pratap Deo and another ***Opp. Parties***
Mr. Prafulla Kumar Rath, Advocate,
(For Opp. Party No.1)
Mr. Prasant Kumar Khuntia, Advocate
(For Opp. Party No.2)

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
21.04.2022

Order No.

5. 1. This matter is taken up through hybrid mode.
2. Perused the kind minutes of Hon'ble the Chief Justice at Flag-X of the brief assigning the matter to this Bench.
3. This CMP has been filed assailing the order dated 18th November, 2021 (Annexure-8) passed in Execution Case No. 10 of 2004 (arising out of T.S. No.3 of 1998), whereby learned Senior Civil Judge, Sundargarh directed to issue a letter to the learned District Judge, Sundargarh requesting for nomination of Salaried Amin Commissioner for execution of the decree passed in T.S. No.3 of 1998.
4. Mr. Samal, learned counsel for the Petitioners submits that Execution Case No.10 of 2004 has been filed by the Opposite Party No.1- Decree Holder (D.Hr.) for execution of the decree passed by learned Civil Judge (Senior Division), Sundargarh in T.S. No.3 of 1998 declaring right, title and interest over the suit land, recovery of

possession through Court and also permanently restraining the Defendants (present Petitioners) from raising any construction over the suit land. During pendency of the execution case, taking into consideration an application filed by the D.Hr.-Opposite Party No.1, one Sri R.N. Sahu was appointed as Salaried Amin Commissioner for execution of the decree, being nominated by learned District Judge, Sundargarh. Vide Order dated 12th February, 2020, learned Senior Civil Judge, Sundargarh directed to issue a writ to the Commissioner to deliver vacant possession of land of an area Ac.0.070 decimals out of Plot No.3/4035/2 (Goda-I) and Ac.0.070 decimals of land out of Plot No.3/4035/1 (Goda-I) in total Ac.0.140 decimals of Hal Khata No. 507 situated in mouza-Talsankara (for short 'the suit land') to the D.Hr. Pursuant to the said order, the D.Hr.-Opposite Party No.1 also deposited one day salary of one Inspector, one male S.I., one female S.I., two Havildars and ten constables (including four women constables). However, the Salaried Amin Commissioner returned the writ vide his letter under Annexure-4 endorsing as under:

".....That the Decree holder has purchased land measuring 7 decimals each vide Sale Deed No.1059 and 1060 on 09.10.1990. In Sale Deed No.1060 land has been described as plot No.3/4035/1, area 7 decimals, and in the said sale deed the trace map of part plot is not available. Similarly, in sale Deed No.1059, trace map of land plot No. 3/4035/2, measuring land 7 decimals of part plot is not available. Further, I am to inform that the land of these two sale deeds are the decreetal land, in which I have been directed to demarcate the aforesaid land. In this regard further I am to mention that the trace map submitted by the DHr prepared by the Amin of M.I. Division, Sundargarh shows in 2 nos. of trace map that Plot No.3/4035, area 7 decimals and plot No.3/4035 area 7 decimals, which are not tallying with the suit plots. Specifically there is also no

mention that which portion of the said plot is 3/4035/1 or 3/4035/2 for 7 decimals each.

In the above context, it is not practically possible to execute the decree given in the decree. So finding no other alternative, I am compelled to return herewith the writ in question along with the documents with a prayer to re-issue the same after proper rectification of the land in question in the trace map for demarcation of the land.....”

5. Subsequently, the D.Hr.-Opposite Party No.1 filed an application to recall the order of appointment of Civil Court Amin Commissioner and to execute the writ through the bailiff on identification of the suit land through the D.Hr. The said application was rejected vide order dated 28th February, 2020 observing that the D.Hr. may take further adequate steps for execution of the decree. Subsequently, due to superannuation of Sri R.N. Sahu, who was appointed as Commissioner, the executing Court vide its order dated 18th November, 2021 directed for issuance of fresh writ for execution of the decree and further directed to write a letter to the learned District Judge, Sundargarh for nomination of fresh Salaried Amin Commissioner. The said order is under challenge in this CMP.

6. Mr. Samal, learned counsel for the Petitioners referring to the provisions of Order XXI Rule 25(2) C.P.C. further submits that when the Commissioner returns the writ with an endorsement that he is unable to execute the process, the Court shall have to examine him touching his inability, and may, if it thinks fit, summon and examine the witnesses as to such inability, and shall record the result. Learned Senior Civil Judge, Sundargarh did not at all adhere to the aforesaid mandatory provision of law for which request for nomination of fresh Salaried Amin Commissioner is uncalled for and cannot be given effect to. It is his submission that since the

statute has provided a specific provision, the Court has to adhere to the same strictly in the manner prescribed. In support of his contention, Mr. Samal, learned counsel relied upon the decision in the case of ***Babu Verghese v. Bar Council of Kerala***, reported in AIR 1999 SC 1281, wherein the Hon'ble Apex Court at paragraph-31 has observed as follows:

“31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor (1875) 1 Ch D 426 which was followed by Lord Roche in Nazir Ahmad v. King Emperor, 63 Ind App 372 : AIR 1936 PC 253 who stated as under:

“Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.”

7. Mr. Samal, learned counsel also submits that the Commissioner in his report has specifically stated that the decree is in-executable. Thus, appointment of fresh Salaried Amin Commissioner will be an abuse of process of the Court and will cause further harassment of the Petitioners-J.Drs. In that view of the matter, he prays for setting aside the impugned order and to drop the execution proceeding.

8. Mr. Rath, learned counsel for the Opposite Party No.1 refuting such submission argued with vehemence that the executing Court has duly followed the procedure in proceeding with the execution case. Referring to the Order XXVI Rules 18-A and 24 C.P.C., he submits that the provisions of Order XXVI (*Commissions*) is squarely applicable to an execution proceeding. Referring to Rule 10(3) of Order XXVI C.P.C, Mr. Rath, learned counsel submits that examination of the Commissioner by the Court

under Rule 25(2) of Order XXI C.P.C, is directory and not mandatory. Sub-rule (3) of Rule 10 of Order XXVI C.P.C. reads as follows:

“(3) Commissioner may be examined in person- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”

9. It is his submission that when the Court records its dissatisfaction or disagreement with the report submitted by the Commissioner, it may examine the Commissioner in person. As such, the provision of Rule 25(2) of Order XXI C.P.C. is directory and not mandatory. The word ‘*shall*’ used in sub-rule (2) should be read as ‘*may*’. In the instant case, when the Court is satisfied with the report submitted by the Commissioner, there was no requirement for his examination. Further, nowhere either before the Executing Court or before this Court, the Petitioners-J.Drs. have stated that they are prejudiced due to non-examination of the Commissioner, who submitted a report endorsing his inability to execute the decree. He further submits that identification of the suit land cannot be questioned by the Salaried Amin Commissioner and in fact, he has never said in his report that the suit land is not identifiable. He has only reported that the trace maps submitted by the Amin of M.I. Division did not tally with the plaint schedule. Thus, there can be no impediment in issuing a fresh process for execution of the decree. Mr. Rath, learned counsel relying upon the decision in the case of ***Ravindra Kaur -Vs- Ashok Kumar and Another***, reported in (2003) 8 SCC 289, submits that when the J.Drs. have made desperate attempts to raise objection with regard to identification of the land and have failed in all their attempts up

to the Hon'ble Supreme Court, they cannot raise such an objection at this stage in the execution proceeding. He further submits that the issue of examination of the Commissioner on his report has now become academic as Shri R.N. Sahu, who was earlier appointed, has already been superannuated from service in the meantime and a fresh Salaried Amin Commissioner has to be appointed for execution of the decree. In that view of the matter, he submits that this CMP merits no consideration and is liable to be dismissed.

10. Mr. Khuntia, learned counsel for the Opposite Party No.2 supports the case of the Petitioners and contended that since the statute provides a definite procedure for examination of the Commissioner on submission of his report endorsing his inability to execute the decree, the same has to be followed in its letter and spirit before appointment of a fresh Commissioner for execution of the decree. The Opposite Party No.2 starting from the appellate stage had all throughout raised objection with regard to identification of the suit land. In support of his case, he also relied upon the decision in the case of **Swastik Agency v. State Bank of India, Bhubaneswar**, reported in 2009 (II) OLR 201, wherein this Court at Paragraphs-38, 41 and 46 held as under:

“PROCEDURE — PRESCRIBED IN LAW — TO BE FOLLOWED:

38. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that, where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim “Expressio unius est exclusio alterius” meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that

manner and in no other manner and following other course is not permissible. (Vide Taylor v. Taylor, (1876) 1 Ch D 426; Nizir Ahmed v. King Emperor, AIR 1936 PC 253; Deep Chand v. State of Rajasthan, AIR 1961 SC 1527; Patna Improvement Trust v. Smt. Lakshmi Devi, AIR 1963 SC 1077; State of Uttar Pradesh v. Singhara Singh, AIR 1964 SC 358; Hukam Chand Shyam Lal v. Union of India, AIR 1976 SC 789; Chettiam Veetil Ammad v. Taluk Land Board, AIR 1979 SC 1573; State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 326; State of Mizoram v. Biakchhawna, (1995) 1 SCC 156 : (1995 AIR SCW 1497); J.N. Ganatra v. Morvi Municipality, Morvi, AIR 1996 SC 2520; Haresh Dayaram Thakur v. State of Maharashtra(2000) 6 SCC 179 : (AIR 2000 SC 2281), Dhanajaya Reddy v. State of Karnataka etc. etc., (2001) 4 SCC 9 : (AIR 2001 SC 1512), Commissioner of Income Tax Mumbai v. Anjum M.H. Ghaswala, (2002) 1 SCC 633 : (AIR 2001 SC 3868), Prabha Shankar Dubey v. State of Madhya Pradesh, AIR 2004 SC 486; Ram Phal Kundu v. Kamal Sharma, AIR 2004 SC 1657; Indian Banks' Association v. Devkala Consultancy Service, AIR 2004 SC 2615; Parle Biscuits (P) Ltd. v. State of Bihar, (2005) 9 SCC 669; Harinarayan G. Bajaj v. Rajesh Meghani, (2005) 10 SCC 660 and Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184 : (AIR 2007 SC (Supp) 1448).

WRIT Court'S -DUTY:

41. *Writ Jurisdiction is discretionary in nature and must be exercised in furtherance of justice. The Court has to keep in mind that its order should not defeat the interest of justice nor it should permit an order to secure dishonest advantage or perpetuate an unjust gain or approve an order which has been passed in contravention of the statutory provisions : (vide Champalal Binani v. CIT, West Bengal, AIR 1970 SC 645; M.P. Mittal v. State of Haryana, AIR 1984 SC 1888; State of U.P. v. U.P. State Law Officers Association, AIR 1994 SC 1654; Dr. Arundhati A. Pargaonkar v. State of Maharashtra, AIR 1995 SC 962; Chandra Singh v. State of Rajasthan, AIR 2003 SC 2889; ONGC Ltd. v. Sendhabhai Vastram Patel, (2005) 6 SCC 454; and K.D. Sharma v. Steel Authority of India Ltd., 2008 AIR SCW 6654).*

STATUTORY PROVISION — TO BE ENFORCED:

46. It is settled law that when the action of the State or its instrumentalities is not as per the rules or regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid.”

It is his submission that in the facts and circumstances of the case, appointment of a fresh Commissioner is without jurisdiction and the impugned order is, therefore, not sustainable.

11. I have heard learned counsel for the parties at length and perused the materials on record including the statutory provisions as well as the case laws cited by learned counsel for the respective parties.

12. Rule 25 of Order XXI C.P.C. provides for ‘*Enforcement of Process*’. Sub-rule (2) of Rule 25 provides for examination of the Commissioner when he gives an endorsement to the effect that he was unable to execute the process. Rule 25 of Order XXI C.P.C. reads as follows;

“25. Endorsement on process- (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay or if it was not executed the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.”

The provision under sub-rule (2) has been introduced in the Code with a definite purpose to find out as to whether the requirements of sub-rule (1) to Rule 25 has been complied with and also to find out the reason for non-execution of the process by the Commissioner to enable the Executing Court to take steps

accordingly for smooth and effective execution of the decree. It can never be the object and intent of the provision to create bottleneck in execution of the decree. Examination of the Commissioner will be necessary, when either the Court is not satisfied or has raised doubt about the endorsement made in the report submitted or any of the parties to the execution proceeding raises objection to the said report. Otherwise, examination of the Commissioner will be an empty formality and will be a futile exercise. It may also result in the abuse of the process of Court. In cases, where, even after the Commissioner is examined, the executing Court requires more information touching the alleged inability of the Commissioner to execute the process, it may summon and examine witnesses as to such inability. In the instant case, a report has been submitted by the Commissioner stating that he could not execute the decree as the trace map prepared by the Amin of M.I. Division did not tally with the land schedule of the plaint. The said report was never objected to by either the D.Hr. or the J.Drs. It was also accepted by the Court.

13. Mr. Samal, learned counsel for the Petitioners submits that the word '*shall*' used in sub-rule (2) connotes that the examination of the Commissioner is mandatory, when he returns the process with an endorsement that he could not execute the same. The word '*shall*' or '*may*' in a statute is not decisive by itself. It must be given a purposive interpretation taking into consideration the object and intent of the provision in which it is used. In the case of ***Dinesh Chandra Pandey -v- High Court of Madhya Pradesh and another***, reported in (2010) 11 SCC 500 , the Hon'ble Supreme Court held at Paragraph-15 as follows:

“15. The Courts have taken a view that where the expression “shall” has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision. This Court in Sarla Goel v. Kishan Chand [(2009) 7 SCC 658], took the view that where the word “may” shall be read as “shall” would depend upon the intention of the legislature and it is not to be taken that once the word “may” is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated.”

14. As discussed earlier, if the Court as well as parties to the execution proceeding are satisfied with the report submitted by the Commissioner, then examination of the Commissioner under sub-rule (2) of Rule 25 will be a futile one. It is, of course, when the Court is not satisfied with or raised doubt about the endorsement made in the report or any of the parties to the execution proceeding raises objection to the same, then the examination of the Commissioner under sub-rule (2) becomes inevitable. Rule-3 of Order XXVI also makes the same abundantly clear. Rules-18-A (Odisha amendment) and 24 of Order XXVI C.P.C. provide that the provisions under the said Order are applicable to the execution proceeding. In Sub-rule (2) of Rule 25 both ‘shall’ and ‘may’ has been used. But, that by itself does not make the word ‘shall’ mandatory. As discussed above, it has to be given a purposive interpretation. Thus, the word ‘shall’ used in sub-rule (2) is directory and not mandatory. Hence, non-examination of the Commissioner is not fatal to the execution proceeding.

15. In the report under Annexure-4, the Commissioner has also suggested for re-issuance of writ after rectification of the description of suit land in the trace map for demarcation of the land. Although he has used the words “*it was not possible to execute the decree on his part*”, but in view of the suggestion given by him, it is clear that he could not execute the decree because of defective preparation of the map. That having been accepted by the Court and the parties to the execution proceeding, there was no requirement of further examination of the Commissioner by the Court in terms of sub-rule (2) of Rule 25 of Order XXI C.P.C.

16. In the instant case, the Commissioner, who had submitted the report under Annexure-4, is superannuated from service in the meantime. Accepting his report and suggestion, the Executing Court has directed to request learned District Judge, Sundargarh for nomination of a fresh Salaried Amin Commissioner. Thus, the objection raised by Mr. Samal, learned counsel for the Petitioners, which is supported by Mr. Khuntia, learned counsel for the Opposite Party No.2, is not sustainable. Further, they have never raised such an objection in the execution proceeding itself. Mr. Samal, learned counsel for the Petitioners also could not satisfy the Court as to how the J.Drs. will be prejudiced, if the Commissioner is not examined in terms of sub-rule (2) of Rule 25 of Order XXI C.P.C.

17. There is no dispute to the case law cited by the respective parties. On perusal of the order sheet annexed to the CMP, this Court finds that the executing Court has followed the procedure under law while passing the impugned order under Annexure-8. Thus, I find no infirmity in the same.

18. Accordingly, the CMP being devoid of any merit stands dismissed. The executing Court shall take steps for expeditious disposal of execution case (Execution Case No.10 of 2004) by executing the decree passed in T.S. No. 3 of 1998.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks

