

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR-2853-2019 (O&M)
Decided on : 25.05.2022**

Mithlesh and another

. . . Petitioner(s)

Versus

Somesh Kumar and others

. . . Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Argued by: Mr. Amit Jain, Advocate
for the petitioner(s).

Mr. G.S. Punia, Sr. Advocate with
Mr. Amitoj Singh, Advocate
for the respondent(s).

MANJARI NEHRU KAUL, J.

The instant revision petition has been filed under Article 227 of the Constitution of India, for setting aside of the order dated 25.01.2019 (Annexure P-6), passed by the learned Civil Judge (Jr. Divn.), Sohna, wherein, the Halqa Patwari (Local Commissioner) was directed to again suggest the mode of partition of the entire suit land including 1 Kanal 8 Marla, on which a road laid by the PWD (B&R) was in existence.

Learned counsel for the petitioners submits that the trial Court has acted contrary to the settled principles of law by directing the Local Commissioner (Halqa Girdawar) to suggest afresh the mode of partition of the entire suit land measuring 10K-10M, including the area of road i.e. 1K-8M, constructed by the PWD (B&R) Department.

Learned counsel submits that once the Local Commissioner in its report dated 29.03.2018 (Annexure P-3) had excluded the area of road after considering the actual ground position, the trial Court was bound to

modify the preliminary decree in accordance with the said report and thereafter, order partition in consonance with the said report.

Learned counsel further submits that since it was beyond the jurisdiction of the trial Court to set-aside the report of the Local Commissioner, the impugned order suffered from material irregularity and thus, deserved to be set-aside.

Per contra learned Senior counsel appearing on behalf of the respondent/plaintiffs, while opposing the prayer and submissions made by the counsel opposite, submits that the impugned order is in accordance with the settled law, as the trial Court could not have travelled beyond the preliminary decree while passing the final decree. Hence, the impugned order being a well reasoned one, did not warrant any interference.

I have heard learned counsel for the parties and perused the relevant material on record.

Admittedly, the pleaded case of the respondent-plaintiff before the trial Court was that, that the suit land measuring 1 Kanal 16 Marlas, as shown in the site plan was acquired by the State of Haryana, however, he was unable to substantiate his plea by way of any cogent, much less, convincing evidence *qua* any such acquisition. Thus, it was held by the trial Court in the preliminary decree that the entire suit land measuring 10 Kanals 10 Marlas, was liable to be partitioned.

The preliminary decree, dated 13th April, 2012, declared the rights of the parties by determining the extent of their shares as well as the total area of land, *qua* which, their respective shares were to be apportioned i.e. 10 Kanals 10 Marlas. Thereafter, an application dated 18.12.2012 (Annexure P-2) for drawing final decree was moved by the

respondents/plaintiffs and accordingly, a Local Commissioner under Order 26 Rule 13 of CPC, was appointed by the trial Court to suggest the mode of partition. The Local Commissioner so appointed by the trial Court, in its report dated 29.03.2018 (Annexure P-3), suggested the mode of partition after excluding the area of road measuring 1 Kanal 8 Marlas, out of total area of 10 Kanals 10 Marlas. The road was seemingly unauthorizedly constructed by the PWD (B&R) Department, as admittedly, there was neither any evidence with respect to the said portion of land having been acquired nor was there any relevant entry in the revenue records to the said effect

Both the parties filed their respective objections to the report of the Local Commissioner dated 29.03.2018 (Annexure P-3), however, the trial Court after perusing the aforementioned report of the Local Commissioner concluded vide impugned order (Annexure P-6) that the Local Commissioner had erred in excluding the land, under the road i.e. 1 Kanal 8 Marlas, while suggesting the mode of partition. More so, since the land under the road had been specifically included in the preliminary decree. Vide impugned order, the trial Court further directed the Local Commissioner to again suggest the mode of partition of the entire suit land i.e. 10 Kanals 10 Marlas, which would be inclusive of the land under the road.

The contention of the learned counsel for the petitioner that the impugned order was erroneous, as the trial Court could not have directed the Local Commissioner to include the entire area, in the considered opinion of this Court is devoid of any merit.

The Hon'ble Supreme Court in *Muthangi Ayyanna Vs.*

Muthangi Jaggarao, 1977(1) SCC 241; has held that a final decree cannot amend or go behind the preliminary decree on a matter, which stands determined by the preliminary decree. However, there is one exception to this general rule, as was laid down by the Hon'ble Supreme Court in ***Ganduri Koteshwaramma and another Vs. Chakiri Yanadi and another, 2011(9) SCC 788***, that, “if in the interregnum i.e. after the passing of the preliminary decree and before the passing of the final decree, the events and supervening circumstances occur necessitating change in shares, there would be no impediment for the Court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed circumstances.”

In the case in hand, no such supervening change of circumstances after passing of preliminary decree, has been brought to the notice of this Court, which would warrant any amendment in the preliminary decree. Admittedly, the road over 1 Kanal 8 Marlas of land, was in existence even prior to the passing of the preliminary decree. Therefore, the trial Court could not have gone behind or amended the preliminary decree on a matter, which was determined by such decree i.e. the total area liable to be partitioned.

To deal with the issue in hand, the provisions of Order 26 Rules 13 & 14 of CPC, are being reproduced:-

“13. ***Commission to make partition of immovable property—***
Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. ***Procedure of Commissioner.***— (1) *The 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 authorised thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.*

(2) *The commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.*

(3) *Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.”*

A bare perusal of the aforementioned provisions reveal that a Court may issue a commission to such person, as it thinks fit for the purpose of partition or separation according to the “rights as declared in such decree”. Still further, a perusal of these provisions leave no manner of doubt that a Court is not bound by the report of the Local Commissioner and it may after hearing the objections, if any, either confirm, vary or even set aside the same. Furthermore, as per Rule 14(3), when the Court sets aside

the report of a Local Commissioner, it is empowered to either issue a new commission or pass such other order, as it may deem fit.

In the instant case, the shares in the preliminary decree have been declared in respect of the entire suit land measuring 10 Kanals 10 Marlas. The Local Commissioner was directed by the trial Court to suggest mode of partition in terms of the preliminary decree. Thus, it was beyond the competence of the Local Commissioner to exclude the area of road while suggesting the mode of partition. Therefore, in the aforementioned circumstances, the report of the Local Commissioner was not in consonance with the preliminary decree. Even in the absence of any objections, by any party to the said effect, it was the bounden duty of the trial Court to reject any such report, which on the face of it, was not in conformity with the preliminary decree.

Dismissed.

(MANJARI NEHRU KAUL)
JUDGE

May 25, 2022

J.Ram

Whether speaking/reasoned: *Yes/No*
Whether Reportable: *Yes/No*