



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.81 OF 2024

Abdul Samad S/o Abdul Gani .Vs. Sheikh Mukhtyar S/o Abdul Jabbar and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.J. Mirza, Advocate for petitioner.

Shri Sawan Alaspurkar, Advocate for respondent Nos.1 to 3.

Shri P.R. Agrawal, Advocate for respondent Nos.5 to 7.

Shri G.N. Shinde, Advocate for respondent Nos.8 to 11.

CORAM : ANIL S. KILOR, J.

DATED : 01/04/2024

1. The challenge raised in this writ petition is to the order below Exh.1 dated 07.11.2023 passed by the 6th Jt. Civil Judge Sr. Dn, Amravati in Special Darkhast No.12 of 2024.

2. The challenge raised is on the limited ground that, once the application for appointment of Commissioner was allowed for effecting the partition on receipt of such report the only three options left to the Executing Court namely to confirm the report; or to vary; or to set aside the same. Where the Court confirms or varies the report it shall pass a decree in accordance with the same as confirmed or varied. But where the Court set aside the report it shall either issue a new Commission or make such other order as it shall think fit.

3. It is submitted that, in the present matter the Court without observing that whether the Court is agreeable or not with the Court Commissioner's report, which says that, considering the variation of the size of the suit property, it is difficult to effect the partition, the Court has taken into consideration the map at Exh.66.

4. On the other hand, Shri Alaspurkar, learned counsel for the respondent Nos.1 to 4 argues that the petitioner has sold out his share to the third person and hence, the petitioner has no right to claim any share in the property or to oppose the impugned order.

5. Shri Agrawal, learned counsel for the respondent Nos.5 to 7 opposing the petition and prays for dismissal.

6. Shri Shinde, learned counsel for the respondent Nos.8 to 11 supports the submission of the petitioner.

7. In light of rival submission, I have perused the impugned order and record.

8. The whole controversy revolved around the compliance of Order 26 Rule 14 of the Code of Civil Procedure (CPC), which read thus:

“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 authorized 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.”

9. From the above referred provision, it is evident that, when the Commissioner was appointing for effecting the partition on receipt of report, the Court has only three options and those are to confirm such report; or to vary; or to set aside the same. In case, the Court confirms or varies the report it shall pass a decree in accordance with the same as confirmed or varied and where the Court sets aside the

report it shall either issue a new commission or make such other order as it shall think fit.

10. In the above referred backdrop, it would be appropriate and beneficial to refer the impugned order, which read thus:

“2. Perused the record. The Court Commissioner has filed court commissioner report at Exh.63. The map of the suit properties Nos.1 and 2 is filed at Exh.66. On perusal of the decree, the DH are entitled for 1/3 share. By taking consideration in account the commissioner report and the map at Exh.66, it would be proper that DH Nos.2, 3, 4 and 5 be given share in the portion mark I, J, K, L and M, N, O, P shown in orange colour in the map Exh.66, while JD Nos.1-B, 1-D, and 1-E be given share in the portion mark A, B, C, D and E, F, G, H shown in yellow colour in the map Exh.66, which would be appropriate and there would be division as per decree. The remaining JD Nos.1-A, 1-F, 1-G, 1-H, 1-I and 1-J as well as JD Nos.2 and 3 are already in possession of their 1/3 share. Thus, it would be proper and appropriate to put DH Nos.2, 3, 4 and 5 and JD Nos.1-B, 1-D, 1-E in possession as per their 1/3rd share. Considering the obstruction caused in the decree it would be proper and appropriate to give police protection at the time of putting into possession.”

11. From the above referred order, it is evident that, there is no observation made by the learned Executing Court about the final conclusion arrived at by the Executing Court as regards the Commissioner's report more particularly, whether to vary it or to confirm it or to set aside it.

12. The Executing Court ought to have recorded the reasons if the Court was of the view that, there is need to vary the report of the Commissioner and not to accept it as a whole.

13. The Court has also not recorded the reasons for relying upon the map at Exh.66 when the Commissioner's report was on record.

14. In the circumstances, in absence of compliance of Order 26 Rule 14 (3) of the CPC, I am of the opinion that, the matter need to be remanded back to the learned Executing Court to take fresh decision within stipulated period. Accordingly, I pass the following order:

- i) The writ petition is **partly allowed**.
- ii) The matter is remanded back to the learned Executing Court to take a decision afresh on the Commissioner's report dated 23.02.2023.
- iii) The parties shall appear before the learned trial Court.
- iv) It is informed that tomorrow the matter is fixed before the Executing Court. In the

circumstances, the learned Executing Court is directed to take fresh decision on or before **12.04.2024** after hearing both the parties.

Writ Petition is **disposed of** accordingly. No order as to costs.

JUDGE