



IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.207 OF 2025
AND
CIVIL APPLICATION NO.25 OF 2025
IN
WRIT PETITION NO.207 OF 2025

1. Mr. Manuel Lawrence D'Costa,
son of late Jose Francis D'Costa,
retired, aged 64 years,
2. Smt. Martha D'Costa,
aged 60 years

Both residing of house No.1/256/1(A),
Opp Holy Cross Chapel,
New Vaddem, Vasco Goa
(Amendment carried out as per order dated 02.05.2025)

.... Petitioners

Versus

1. Mr. Peter J. Godinho,
2. Brazinha Godinho,

Both Indian national, major in age,
House No.2/256/(1) A,
Opp. Holy Cross Chapel,
New Vaddem Goa.

... Respondents

(Amendment carried out as per order dated 02.05.2025)

Mr. Shivraj Gaonkar, Advocate for the Applicants.

Mr. Bhargav Khandeparkar, Advocate for the Respondents.

CORAM:- VALMIKI MENEZES, J.

DATED :- 1st August, 2025

ORAL JUDGMENT:

1. By this petition an order dated 23.08.2024 passed by the Civil Judge, Senior Division, Vasco in Regular Civil Suit No.31/2014/B has been assailed. By this order, the Trial Court has overruled the objection of the Petitioner, placing reliance on the report/plan prepared by the Commissioner, Tito D'Cunha, at Exh.D-120 of the file of the trial Court.

2. The background facts that have led to passing of impugned order are as follows:

A. The Plaintiffs/Respondents herein filed a suit for declaration that they and the Defendants/Petitioners are co-owner of the suit property bearing Chalta No.1 PT Sheet 98; the suit property comprises two parcels bearing plot No.28/A admeasuring 289 sq.mtr. and plot No. 27/A admeasuring 59 sq.mtr. These plots were respectively purchased by the Plaintiffs/Respondents and Defendants/Petitioners herein respectively in the year 1985 and 87. Evidence was led by the parties, after which an amendment was sought to be incorporated to the plaint to convert the plaint to suit for

partition and injunction. Partition which was sought by the Plaintiffs was to declare that the Plaintiffs and Defendants were entitled for half share each in the combined plot of 348 sq. mtr and according to the Plaintiff each would be entitled to own 186.5 sq.mtrs of the plot on which their respective houses, which have already been constructed. Apart from seeking separation of the two plots in the aforementioned manner, the Plaintiffs sought permanent injunction against the Defendants/Petitioners herein directing them to remove the railing affixed to the staircase of the Plaintiffs' building by the Defendants and to demolish the illegal floors constructed by the Defendants.

B. After the suit was converted to a partition suit, the Trial Court passed a preliminary decree on 19.08.2019, declaring the Plaintiffs and Defendants to be owners of the undivided half share each in the combined suit plot. Thereafter, the Trial Court in terms of Order 26, Rule 13 CPC appointed a Commissioner named Tito D'Cunha to draw a plan in such a manner as to divide the combined plot into two portions, so as to assist the Court to come to a final decree of partition between the parties.

The Commissioner drew up such a plan, but however did not show the existing structures thereon. On a further direction by the Court passed by order dated 31.03.2021, the

Commissioner was directed to draw up an additional plan depicting these structures which was then produced before the Court as exhibit D-120.

D. Objections were raised by the Defendant to exhibit D-120 which came to be dismissed by order 06.03.2023.

E. Thereafter, another application was moved by the defendants at Exhibit D-123 requesting cross-examination of the Commissioner appointed which was rejected by an order of 06.03.2023.

F. The matter then proceeded with Additional issues being framed as to whether the Plaintiffs prove the encroachments and extensions, done by the Defendants. The issue reads as under:

" Whether the Plaintiffs are entitled to a judgment and decree partitioning the suit property by meets and bounds in accordance with the report of commissioner Mr. Tito Cunha at Exhibit D-109?"

G. A further order came to be passed on 10/04/2024 on Exh.D-133 filed by the Plaintiffs, directing that a fresh trial to be conducted on other issues, except the aforementioned issue.

H. The Plaintiff then filed his affidavit in evidence on 26.06.2024 at exhibit C-139 wherein at paragraph 1 thereof he stated that he was a joint owner of the property shown in report of the Commissioner at Exh-119, which has become final in the present suit. Whilst recording the examination-in-chief on 26.06.2024, at paragraph 6 thereof, he has stated that he has placed reliance on the report of Tito Cunha, Court Commissioner (exhibit-120). A reference was made in this to the additional report of Tito Cunha, depicting structures and the plan drawn up which is at exhibit- 109, which is the earlier report. An objection was raised to the marking of this report in evidence, mainly on the ground that the Plaintiffs were not the author of that report, and the other issue was a fresh trial, and could not relate to the question of partition of the suit property. It is on this objection that the interim order has been passed.

3. The main submissions raised by the learned Advocate for the Petitioners are that a report of a Commissioner appointed in a suit for partition, in terms of Order 26, Rule 13 CPC is not evidence, but is a report to assist the Court in passing the final decree of partition. It was further submitted that merely because the report has been given an exhibit number on the file of the Trial Court, it does not partake of being evidence in the suit, and must be regarded only as a report of the Commissioner to assist the Court in deciding and passing a final decree of partition.

4. It was further submitted that the observations made in the impugned order to the effect that the report is evidence in the suit and part of the record, is legally an incorrect finding since the report of the Commissioner, in the present case, is not one under Order 26 Rule 10(2) CPC, but is a report filed in a suit for partition under Order 26 Rule 13 and 14. It was further submitted that the observation at paragraph 31 in the order, that is based on the report of the Commissioner, the issue of partition was decided and a primary decree was drawn, is also factually erroneous. It was then submitted that these observations made by the trial Court, whilst passing the impugned order overruling the objections, would come in the way of the Petitioners from either applying for leading evidence to rebut the report of the Commissioner or on any other evidence that the Defendants seek to lead at a further stage.

5. The submissions of the Petitioners are rebutted by the Advocate for the Respondents contending that the Petitioners not having challenged orders dated 31.03.2021, two orders dated 06.03.2023 and order dated 12.03.2024 and 10.04.2024, which have attained finality. The Defendants are now foreclosed from raising objections to the Report of the Commissioner or as to the question on the final partition.

6. It would be seen that from the combined reading of Order 26 Rule 13 and 14 CPC, after the preliminary decree is passed by the Court, it is empowered to appoint a Commissioner to divide the property in two shares, for allotment in the final decree. A further reading of these

provisions show that the Court could appoint the Commissioner to seek assistance from this Commissioner, to draw up a plan and to suggest the manner in which the property could be divided by meets and bounds, and whilst giving such direction the Court also could call upon the Commissioner to value each of the shares that the Commissioner suggests by his report. Under sub-Rule 3 of sub-Rule 14 of Order 26, the Court may confirm its intention to go by the report, or it might vary the report and may pass a decree by taking assistance from the report. In any event, the Court is not bound by the report but the Court has to arrive at its own conclusions, whilst granting the final partition.

7. In the present case, all objections to the two reports of the Commissioner under Exhibit-109 and Exhibit-120, have been rejected. The Court has disallowed the request of the Defendants to cross-examine the Commissioner. Since these orders have attained finality for want of further challenge, the petitioner is now precluded from raising any objections to the reports. However, the report by itself does not form part of the evidence recorded by the parties. The report is only a document given an exhibit number for convenience, but is not to be read in evidence. The only purpose that the report serves now is to assist the Court in arriving at a final decree of partition or whether it should be granted in terms of the report or in terms of what the Court finally decides. This being the case, the observation made by the Trial Court that the issue of partition has been decided and the further observation that Order 26 Rule 10(2) CPC

provides that such report is evidence in a suit, are required to be read in context.

8. There is no doubt that in the present case, Order 26 Rule 10 (2) CPC does not apply since that provision applies to commission of local inspection. In a suit for partition, Order 26 Rule 13 and 14 would apply. The Commissioner's report under Order 26, Rule 13 and 14 is not evidence and cannot be read as evidence of the parties. At most, during the course of the evidence of a party, a party is free to refer to or lead evidence in reference to the report or plan which forms part of the Commissioner's report. This may be done to assist the Court as to what the party is attempting to demonstrate/explain to the Court by way of evidence. This has to be understood, in the facts of the present case, as being evidence now led by the parties in context of the remaining issues and not the issue of partition. The issue of partition could be decided by the Court, not only based on the report of the Commissioner, but the Court is free to come to its own conclusions whilst granting or refusing to grant any final decree of partition. The observations made by the Court in the impugned order that report has to be read in evidence has to be construed in that context. Therefore, considering that the orders referred above, which have turned down objections in the Report of the Commissioner, and have become final, the objections of the Defendants/Petitioners have been correctly overruled. However, they shall be considered as overruled for the aforementioned reasons and not for reason that the Partition has been

decided or for reasons that Order 26 Rule 10 (2) CPC would apply to the facts and circumstances of the present case.

9. For the reasons stated above, the petition is therefore rejected.

10. The suit may be disposed of as expeditiously as possible and preferably within six months from today.

11. Rule stands discharged.

12. Pending application, if any, also stands disposed of.

VALMIKI MENEZES, J.