

Order Passed Below Exh.No.23 in
Reg Dkst No.90/2019
(Padma Pore Vs. Vitthal Patange)

1. This is an application for effecting the module of partition of house property in terms of order in final decree which is subject matter of suit property in RCS No. 377/2010 and final decree proceeding No. 6/2012, by appointing Court Commissioner. Brief facts of application are as under.

2. That the present darkhast is in respect of the final order in the final decree proceeding No. 6/2012. In the said proceeding respondent No. 6 has died therefore, the distribution of her share came to be again devolved amongst the family members. Initially, in the original suit the share of family members/parties were calculated in $1/7^{\text{th}}$ share each. After her demise, their share came to $1/6^{\text{th}}$ share each. The share in $1/6^{\text{th}}$ formula was suggested by the then commissioner in final decree proceeding No. 6/2012 by virtue of letter No. AKNM. Accordingly, the decree holder prays, for allotment of $1/6^{\text{th}}$ share to J.D. No. 2, increased share as per commissioner and allotment of remaining share to J.D. No. 1, 3, 4 and 5, the commissioner is appointed for suggesting the shares as per the instruction of decree holder and for submission of the court thereto.

3. Judgment Debtor No. 2 has resisted this application on the pedestal of the fact that, whatever measurement and survey has been conducted was reported as per Exh. 32 in the final decree proceeding. But the present division of $1/6^{\text{th}}$ share each is not acceptable to him. After demise of Rukmini Ganpat Patange, it was suggested by the commissioner to increase the share to the extent of $1/6^{\text{th}}$ share each, it is not acceptable to J.D.No. 2. He has challenged the said final decree proceeding before the appellate court. Decree holder is not entitled to claim $1/6^{\text{th}}$ share.

Accordingly, claimed rejection of this application.

4. Heard the learned Advocates of both sides at same length.

5. On perusal of the judgment in the final decree proceeding No. 6/2012 it appears that the court commissioner reported about 1/7th share each to decree holder (DH) and Judgment debtors (JD) No. 1, 3, 4 and 5. So far as, the non applicant No. 2 is concerned, the property which is in his possession would be held to be justified for the cause by virtue of report of commissioner to the extent of the portion identified AKNM. Accordingly, it was transpired that if 1/6th share of entire disputed house be given to JD No. 2 namely Anand Vitthal Patange and remaining property be given to JDs No. 1, 3 to 5 as per the report of the commissioner. According to the Ld. Advocate of J.D. No. 2 there is nothing in the excerpts of exh. 32 in the final decree proceeding to believe that there had been measurement of the suit property in terms of 1/6th share. There is no such report of commissioner to illustrate about the division of 1/6th share to the parties. *Per contra*, the Ld. Advocate of the decree holder would argue that there is no bar for issuance of commission in this darkhast for the sake of measurement of the suit property in terms of 1/6th share.

6. The tenor and ambit of final decree is quite clear that, an extrapolated suggestion of 1/6th share is made in the report of court's commissioner, which is identified as AKNM. I have perused the report of the Court commissioner which is forming part of a registered instrument because the excerpts of final decree is apparently registered. It is transpired that, the portion AKNM is in the possession of J.D. No. 2. At that time, the court commissioner had taken into consideration the

convenience of the parties and arrived at the conclusion that, AKNM being possessed by J.D. No. 2 and if it is given to him only, no difficulty would surface. It is also significant to be noted that, the court commissioner opined that, at the time of investigation, J.D. No. 2 was absent therefore his suggestion and opinion was not possible. At the relevant stage in the final decree proceeding judgment debtor has not agitated his protest or any evidence to shatter the report of court commissioner being outlandish. It is implicit that, he has acquiesced for it by his sheer silence. Now judgment debtor No. 2 is estopped by his conduct and cannot block the execution of decree by his liberty. The learned advocate of judgment debtor argued that the house is not partible and the J. D. wants to settle the matter. But decree holder has no willingness to accede to the request of the learned advocate. According to the learned advocate of J.D. No. 2, the prayer of this application is not happily worded which should have to be in parity with the order in final decree proceeding. Now it is useful to assess the prayer. It is made not only based on the suggestion of commissioner for 1/6th share but also it is in respect of measurement based on previously devised share by the court commissioner.

7. It is tacit in this application that, the appointment of commissioner is sought particularly for bringing into force the measurement of property mentioned in the final order of the final decree proceeding. For that purpose, there is no need to again appoint court commissioner because already entitlement is decided in the final decree proceeding. It is now absurd to again assess whether the subject-matter is partible by measurement or survey because it is already done. The executing court is not at all allowed to go behind the decree. At this stage only implementation of order in the final decree is required and for that, proper steps are needed for putting the parties in the possession as per

registered decree and map. Therefore, the application for appointment of court commissioner again is not tenable because it will not fetch the fruits of final decree, *mutatis mutandis* it will upset the final decree. Resultantly, I proceed to pass the following order.

ORDER

Application is rejected in above terms.

Date: 27.06.2022

Sd/--
(Wahab A. Syed)
3rd Judicial Magistrate, F. C.
Sangli.

CERTIFICATE

I affirm that, the contents of this PDF file Judgment/Order are same, word to word, as per the original Judgment/Order.

Name of the Stenographer :	A.P.Patil
Court :	IIIrd Joint Civil Judge Junior Division, Sangli.
Date :	27/06/2022
Order signed by the Presiding Officer on :	27/06/2022
Order uploaded on :	27/06/2022