

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL MISCELLANEOUS JURISDICTION No.73 of 2021**

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Anil Kumar Srivastava Son of Late Dr. Murli Manohar, Murli Chank,  
Main Road, P.S. Rafiganj, Dist. - Aurangabad - 824125.

..... Petitioner/s

Versus

- 1.1. Smt. Prem Lata Srivastava widow of Late Nirmal Kumar Srivastava, resident of 304, Karpura Moon Palace, Chitkohra, P.O. and P.S.- Anisabad, Town and Dist.-Patna.
2. Niraj Kumar Srivastava, Son of Late Bimal Kumar Srivastava, resident of Simuldih (Tali Fara), P.O. Damodarpur via ISM, Dhanbad, Jharkhand, PIN -821004.
3. Santosh Kumar Srivastava, Son of Late Bimal Kumar Srivastava, resident of mohalla Chitra Gora Hirapur, left lane from the house of Ramadhar Singh, Dhanbad, Jharkhand, PIN - 826004, at present residing at Chanakyagar, Steel Gate, Govindpur Main Road, P.K.G. Ashram, P.S. and Dist. - Dhanbad, Jharkhand, PIN -828109.
4. Pankaj Kumar Srivastava, Son of Late Bimal Kumar Srivastava, resident of mohalla Chitra Gora Hirapur, left lane from the house of Ramadhar Singh, Dhanbad, Jharkhand, PIN - 826004, at present residing at Chanakyagar, Steel Gate, Govindpur Main Road, P.K.G. Ashram, P.S. and Dist. - Dhanbad, Jharkhand, PIN -828109.
6. Akhauri Prakash Kumar, Son of Late Daya Kumar, Resident of 219, Patliputra Colony, Patna.
7. Akhauri Subhash Kumar, Son of Late Daya Kumar, Resident of 219, Patliputra Colony, Patna.
8. Akhauri Bikash Kumar, Son of Late Daya Kumar, Resident of 219, Patliputra Colony, Patna.
9. Smt. Madhulika @ Madhu, W/o Mukuljee, daughter of Daya Kumar, Resident of 219, Patliputra Colony, Patna.
10. Dr. Anupam Lal, Son of Late S.K. Lal, Resident of 40, MIG, Hardeo, Bhilai Nagar, Chattisgarh.
11. Uttam Lal, Son of Late S.K. Lal, Resident of 40, MIG, Hardeo, Bhilai

Nagar, Chattisgarh.

12. Renu Kumar Daughter of Late S.K. Lal Resident of 40, MIG, Hardeo, Bhilai Nagar, Chattisgarh.
13. Dr. Ranjana Wadhwa, daughter of Late S.K. Lal Resident of 40, MIG, Hardeo, Bhilai Nagar, Chattisgarh.
15. Smt. Asha Sinha, Wife of D.N. Sinha, Quarter no. 3025, Sector 5B, Bokaro Steel City, District Dhanbad, Jharkhand.
16. Bishwanath Prasad, Son of Kuldeep Prasad, resident of Rafiganj, P.S. Rafiganj, Dist. - Aurangabad.
17. Dina Nath Prasad, Son of Kuldeep Prasad, resident of Rafiganj, P.S. Rafiganj, Dist. - Aurangabad.

..... Respondent/s

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*Acts/Sections/Rules:*

- *Order XXVI Rules 13, 14(1) and (2), 18 of the Code of Civil Procedure*

*Cases referred:*

- *Pabitri Devi and Ors. Vs. Rash Bihari Gope and Ors. reported in 2010(2) PLJR 942*
- *Civil Miscellaneous Jurisdiction No. 337 of 2019*
- *M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore and others Vs. Modi Transport Service, reported in (2022) 14 SCC 345*
- *Asifunisa and another Vs. Ali Imam, reported in 1992(1) PLJR 380*
- *Jagdish Bhagat & Ors. Vs. Sri Baijnath Rai & Ors., reported in 2007(3) PLJR 719*

*Petition - filed for setting aside the order whereunder the trial court rejected the report of the Survey Knowing Advocate Commissioner.*

*Plaintiff was decree holder before the trial court who filed Partition Suit for partition of suit property. The partition suit was allowed. Survey Knowing Advocate Commissioner was appointed for making the partition according to the decree as provided under Rule 13 of Order XXVI of the Code. Advocate Commissioner completed the order sheet of measurement in presence of the parties and other independent persons. When no objection was received, the Advocate Commissioner prepared his final report and submitted it to the trial court.*

*Held - Court has requisite power to appoint a second commissioner upon setting aside the report of the first commissioner, if situation so*

warranted. Therefore, there could be no challenge to the authority of the court to reject the final Takhtabandi report and the order could not be challenged on this ground. (Para 7)

The trial court has taken into consideration the objection and thereafter, considering the iniquitous distribution of the property between different claimant when such inequality is writ large on the face of the record, it is not possible to sustain such report even if objections were not taken at the time of preparation of report of the Advocate Commissioner. The fact has been apparently made clear by trial court while passing the impugned order when it observed that the valuable and useful commercial and residential multi storied building was allotted in favour of the plaintiff in Takhtabandi whereas barren land in the bed of river Sone was allotted in favour of the respondents. It has also come in submission that some of the defendants were not even allotted shares. Based on these facts if the trial court found the report of the Advocate Commissioner to be bad and rejected the same, this Court would be most reluctant to interfere in such order. (Para 7)

Trial court was directed to immediately proceed for appointment of a new Pleader Commissioner and it is further directed that the Pleader Commissioner would submit the report within requisite time. (Para 9)

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17. Dina Nath Prasad, Son of Kuldeep Prasad, resident of Rafiganj, P.S.



Rafiganj, Dist. - Aurangabad.

... .. Respondent/s

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**Appearance :**

For the Petitioner/s : Mr.Ray Saurabh Nath, Advocate  
For the Respondent/s : Mr. Anshuman Singh, Advocate  
Mr.Ranjay Kumar, Advocate

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**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA**  
**CAV JUDGMENT**

**Date : 07-01-2025**

The present petition has been filed for setting aside the order dated 14.10.2020 passed by learned Sub-ordinate Judge 2<sup>nd</sup>, Aurangabad in Partition Suit No. 24 of 2003, whereby and whereunder the learned trial court rejected the report dated 21.10.2019 of the Survey Knowing Advocate Commissioner submitted under Order XXVI Rule 14(1) and (2) of the Code of Civil Procedure (in short ‘the Code’) apart from other relief.

2. Briefly stated, the facts of the case, emerging from the record, are that the petitioner/plaintiff was decree holder before the learned trial court who filed Partition Suit No. 24 of 2003 for partition of suit property of Schedule 1 to 4 of the plaint. On 11.10.2018, the partition suit was allowed and the petitioner was found entitled for 1/7th share. However, Schedule 3 and 4 were not held to be joint family properties. Accordingly, the preliminary decree was sealed and signed on 27.10.2018 and no appeal was filed against the judgment and decree. Thereafter,



Survey Knowing Advocate Commissioner was appointed for making the partition according to the decree as provided under Rule 13 of Order XXVI of the Code. On 11.08.2019, the learned Advocate Commissioner completed the order sheet of measurement in presence of the parties and other independent persons. On 01.09.2019, the learned Advocate Commissioner prepared a draft of Raibandi of the suit land and sent it with notice on 22.09.2019 with draft of Takhta Bandi seeking objections. When no objection was received, the learned Advocate Commissioner prepared his final report on 21.10.2019 and submitted the report on 22.10.2019 to the learned trial court in terms of procedure prescribed under Order XXVI Rule 14(2) of the Code. The respondents filed their objection on 21.10.2019 before the court against the Takhta allotted by the learned Advocate Commissioner. The petitioner filed his rejoinder on 01.10.2020 supporting the report of the learned Advocate Commissioner. Thereafter, learned Sub Judge- II, Aurangabad passed the order on 14.10.2020 and set aside the report of the learned Advocate Commissioner. The said order is under challenge before this Court.

3. Learned counsel for the petitioner submitted that the learned trial court has committed manifest illegality in



setting aside the report dated 21.10.2019 of the learned Survey Knowing Advocate Commissioner. Learned counsel further submitted that the learned trial court has not considered the finding on merits recorded by the learned Advocate Commissioner in favour of the parties. Learned trial court did not consider the fact that the respondents could not have raised objections to the report of learned Advocate Commissioner as they chose not to appear before the Commissioner even on notices issued upon them under Rule 18 of Order XXVI of the Code and also subsequently not raising any objection before him. The learned trial court should not have applied rules of natural justice in preparation and acceptance of the report of the learned Advocate Commissioner as admittedly he had given notice twice to the parties before preparing and finalizing the report with the tacit approval of the parties. The order is erroneous also for the reason that the report of the learned Advocate Commissioner was rejected behind his back without even examining him on any objection against his report and finding fault with the report of the learned Advocate Commissioner. Learned counsel further reiterated that the respondents were supposed to put their objection before the learned Advocate Commissioner and they failed to do so and the



respondents directly challenged the report of the learned Advocate Commissioner before the learned trial court. Learned counsel referred to a decision of Hon'ble Single of this Court in the case of ***Pabitri Devi and Ors. Vs. Rash Bihari Gope and Ors.*** reported in ***2010(2) PLJR 942*** on the point that order sheets whether in judicial or quasi judicial proceeding, are to be considered sacrosanct. If an order sheet is questioned and the author of the order is not in a position to defend himself then the order recorded in order sheet will prevail. Learned counsel further submitted that the defendants participated in the final decree proceeding and awaited for the result and if they did not challenge the draft report of the learned Advocate Commissioner, they are estopped from challenging the final report and also the jurisdiction of the learned Advocate Commissioner. Without examination of the learned Advocate Commissioner on his report, the learned trial court could not have rejected the same since the defendants did not make any effort for preparation/correction of the final Takhta Bandi by the learned Advocate Commissioner, and it was for the first time the said plea has been raised by the defendants. Thus, the learned counsel submitted that the impugned order is not sustainable and the same be set aside.





4. Learned counsel appearing on behalf of respondent nos. 2, 16 and 17 vehemently contended that there is no infirmity in the impugned order and the same does not require any interference in the present proceeding. Learned counsel further submitted that these respondents are transferees of portion of suit property prior to filing of the suit and they are contesting respondents as other respondents have no interest in the case. The outcome of the final decree proceeding would have directly affected the right and interest of the respondents in the suit property purportedly transferred to them if their contention was not taken into consideration and learned trial court proceeded in the matter in this background of fact. Learned counsel further submitted that the present Civil Miscellaneous is misconceived and is unsustainable. The impugned order has been passed in accordance with law and there is no jurisdictional error in the impugned order. Learned counsel further submitted that the notices were never served to the answering respondents and even the submission of the petitioner in this regard is completely ambiguous as the petitioner claims that the notices were sent to nine defendants but it is not clear who were the nine defendants since after death of defendant no. 6 who died prior to the passing of



preliminary decree, and taking into consideration the heirs/legal representatives of defendant no. 6 altogether 14 defendants. So, no notices were sent to 5 defendants. Further, no notices have been sent to non-appearing defendants, i.e., defendant nos. 7, 8 and 9 out of whom defendant nos. 7 and 8 have also died after passing of the preliminary decree. Learned counsel further submitted that the learned Advocate Commissioner did not take into consideration the shares sold by different joint owners and the report has been prepared at the behest of the plaintiff/petitioner and it is a biased report influenced by the plaintiff/petitioner. The report does not show any measurement at all and was not held in presence of all the parties, some of whom have not even been issued notices. The order of the learned Advocate Commissioner does not mention addresses of some of the witnesses nor the map bears the signature of the parties and the witnesses present. The entire report is doubtful and contrary to the prescribed procedure. The said report is merely a table report as this fact also bears out from the area covered by the learned Advocate Commissioner. The property in Schedule-1, 1(a) and 2 of the plaint are situated in Aurangabad from Rafiganj to Daudnagar. The distance between Rafiganj and Daudnagar is about 50 km and it was not possible to make



scientific measurement at two places on the same date. Learned counsel further submitted that when the notices and draft Takhtabandi were not sent by the learned Advocate Commissioner to all the defendants, the defendants could not have filed any objection to such draft. The respondent nos. 2, 16 and 17, who have been residing in Dhanbad and Rafiganj, coming to know about draft Takhtabandi, submitted their objection to the learned Advocate Commissioner. The objections submitted on 21.10.2019 were refused to be accepted by the learned Advocate Commissioner on the ground that he had already submitted the final Takhtabandi report. Learned counsel further submitted that 20.10.2019 was Sunday and the objections could not be submitted before the learned Advocate Commissioner on 20.10.2019 for the aforesaid reason.

5. Learned counsel further submitted that even on the merits of the report, it is evident that the report is against the preliminary decree as the learned trial court decreed the suit holding that the plaintiff was entitled to 1/7th share in all the properties mentioned in Schedule-1, 1(a) and 2 but the plaintiff has been allotted the entire property of Khata No. 190, Plot No. 1660/799/801 measuring 25-26 decimals mentioned in Schedule-2, which is a commercial -cum- residential property



and which is more than 1/7th share of the plaintiff/petitioner. Learned counsel reiterated that the draft Takhtabandi is ex-parte as all the defendants were not given notices by learned Advocate Commissioner. In his report the learned Advocate Commissioner has wrongly valued the properties of Schedule-2 land of Khata No. 190, Plot No. 1660/799/801 which is a commercial -cum- residential property and is valued more than Rs. 1.5 crores and all the parties are entitled to share therein. The land allotted to the defendants having an area of 2 bighas 16 kathas situated in Daudnagar forming part of Schedule-1 property is a useless, non-fertile waste land unusable for agriculture, residential or any other purpose because the same is situated at the bed of Sone river and its valuation is less than Rs.10,000/- per bigha. Defendant nos. 1 and 8 sold their 1/7th share in the suit property mentioned in Schedule 2(i) property by registered sale deed No. 1497 dated 05.02.2019 to one Mangal Lal Srivastava for a consideration of Rs.29,80,000/-. In spite of this fact, the said purchaser was not issued any notice and was not made party to the suit. Therefore, allowing the entire Plot No. 799 and 801, Khata No. 190 of Rafiganj to plaintiff is wholly illegal as the transferee cannot be compelled to take the share in suit property at Daudnagar. Learned counsel



further submitted that the objection taken by the petitioner that the objections filed by the respondents were not supported with affidavit is minor irregularity and the same cannot be a ground for rejecting the objection. Learned counsel again submitted that the local inspection was made behind the back of some of the defendants who were not even put to notice by the learned Advocate Commissioner. Learned counsel further submitted that there has been no service of notice and even if any presumption was to be made against the respondents, the same could be done only after 30 days of issuance of notice. But in the present case the local inspection has been held on 11.08.2019. If the defendants were declared served prior to 30 days of issuance of notice, apparently there is no service on respondents. Thereafter, a clandestine inspection was held in absence of other defendants on behalf of the plaintiff and there has been no scientific measurement of the suit property nor the suit property has been properly valued. Learned counsel for the respondents referred to a decision of learned Single Judge of this Court dated 20.06.2019 passed in ***Civil Miscellaneous Jurisdiction No. 337 of 2019***, wherein it has been observed that sub-rule (3) of Rule 10 to 26 of the Civil Procedure Code provides that 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 and the learned Single Judge further held that merely because the objections raised by the respondents has been sustained and the report of the Pleader Commissioner has been rejected, the order impugned cannot be held to be bad or perverse. Learned counsel further referred to a decision of Hon'ble Supreme Court in the case of ***M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore and others Vs. Modi Transport Service***, reported in (2022) 14 SCC 345, wherein the Hon'ble Supreme Court in paragraphs 34 to 37 held as under:-

*“34. With regard to the significance and effect of the report submitted by an expert, this Court in Dayal Singh v. State of Uttaranchal states that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court.*



*Simply put, an expert deposes and does not decide, his duty is to furnish the court with necessary scientific/technical criteria so as to enable the judge form his own independent judgment by the application of these criteria to the facts proved in evidence.*

*35. There is also a distinction between the scope and functions of an arbitral tribunal and a Commissioner appointed under Order 26 Rules 9 and 11 of the Code. For submission to arbitration, there must be an arbitration agreement or an agreement in terms of Section 21 of the Act that the difference or dispute between the parties for which they intend to be determined in a quasi-judicial manner. Commissioners are appointed by the court. Appointment may be with consent of the parties, or even when there is objection to the appointment. Pre-existing agreement or the requirement that the parties agree before the court, as is mandatory in case of arbitration, is not necessary when a court directs appointment of a Commissioner. In the case of a reference to a Commissioner, all that the parties expect from the Commissioner is a valuation/ examination of the subject-matter referred, which he would do according to his skill, knowledge and experience, which may*



*be without taking any evidence or hearing argument.*

*36. In light of the aforesaid decisions, we would like to introduce the principle of a "facilitator" which a court may appoint, be it a Commissioner or an expert, for a specific purpose and cause for ascertainment of a fact which may be even disputed. In some cases, the Commissioner may even hear the parties and give his expert opinion based on the material or evidence produced by the parties before the Commissioner, as in this case when the court appointed a chartered accountant who as an expert was required to give his opinion on the statement on accounts to facilitate and help the court arrive at a fair and just decision. It was to save the court's time and cut delay in the decision by the court.*

*37. Order 26 Rule 9 of the Code gives wide powers to the court to appoint a Commissioner to make local investigations which may be requisite or proper for elucidating any matter in dispute, ascertaining the market value of any property, account of mesne profit or damages or annual net profits. Under Order 26 Rule 11, the court has the power to issue a commission in a suit, in which examination*





*of adjustment of accounts is necessary, to a person as it thinks fit directing him to make such examination or adjustment. When a court issues such a commission to such a person, it can direct the Commissioner to make such an investigation, examination and adjustment and submit a report thereon to the court. The Commissioner so appointed does not strictly perform "judicial act which is binding" but only a "ministerial act". Nothing is left to the commissioner's discretion, and there is no occasion to use his judgment or a permitting the Commissioner to adjudicate and decide the issue involved; the Commissioner's report is only an opinion or noting, as the case may be with the details and/or statement to the court the actual state of affairs. Such a report does not automatically form part of the court's opinion, as the court has the power to confirm, vary or set aside the report or in a given case issue a new commission. Hence, there is neither abdication nor delegation of the powers of functions of the court to decide the issue. Sometimes, on examination of the Commissioner, the report forms part of the record and evidence. The parties can contest an expert opinion/Commissioner's report, and the court, after hearing objections, can*



*determine whether or not it should rely upon such an expert opinion/Commissioner's report. Even if the court relies upon the same, it will merely aid and not bind the court. In strict sense, the Commissioners' reports are "non-adjudicatory in nature", and the courts adjudicate upon the rights of the parties."*

Learned counsel submitted that the act of the judicial commissioner is a ministerial act and it is not a judicial act which is binding and it is left to the discretion of the court that whether it would rely upon such report or not. Learned counsel further referred to a Full Bench decision of this Court in the case of ***Asifunisa and another Vs. Ali Imam***, reported in ***1992(1) PLJR 380***, wherein the Hon'ble Full Bench held that in a case where the court finds that the report is a nullity or otherwise improperly obtained or therein the Commissioner has not followed the directions of the court, such a report will be inadmissible in evidence and thus the court must be held to have inherent power to set aside the said report and thus held that it cannot be said that in no circumstances, the court will have no right to set aside the report and in this given situation, the court has not only the requisite jurisdiction but also a duty to set aside such a report and direct a local inspection be made by another



Pleader Commissioner. Learned counsel has also referred to another decision of this Court in the case of ***Jagdish Bhagat & Ors. Vs. Sri Baijnath Rai & Ors.***, reported in **2007(3) PLJR 719**. Paragraphs 16 and 17 read as under:-

*“16. On a consideration of the rival submissions of the parties and further on a comparative analysis of the provisions of Order 26 Rules 9 and 10 of the Code of Civil Procedure appertaining to commission for local investigation with those of Order 26 Rules 13 and 14 appertaining to Commission to make partition of immovable property, this court is of the view that these two types of commissions stand clearly on different footings. So far as commission to make partition is concerned, it is incumbent upon the court to either confirm or set aside the report or reports that have been filed by the Pleader Commissioner for carving out separate share of the parties. If the same is confirmed on merit then, as a matter of course, the final decree is prepared in the partition suit in terms of such report of the Pleader Commissioner as confirmed on merit by the court below.*

*17. So far as the commission for local investigation is concerned, there can be hardly any doubt that the report submitted*



*by such commission can only be treated to be an evidence in the suit and it does not stand on the same footing as a report of the Pleader Commissioner in a partition suit. However, an important right has been conferred upon any of the parties to raise objections to the report of the Pleader Commissioner and also with the permission of the court, to examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report or as to the manner in which he has made the investigation. It has further clearly been provided in Order 26 Rule 10 sub rule (3) that where the court is, for any reason, dissatisfied with the proceedings of the Commissioner it may direct further such enquiry to be made as it shall think fit. The said provision has been interpreted by the Full Bench of this court as conferring a definite authority upon the trial court to either accept the report of the Pleader Commissioner or even to set it aside. It has further been held in the Full Bench decision cited above that once the court rejects the report of the Pleader Commissioner then it has the power to appoint a second Commission and not only that it has such jurisdiction, but it has the duty to set aside*



*such a report and direct a local inspection to be made by another Pleader Commissioner.”*

On the strength of aforesaid decisions, learned counsel vehemently argued that the impugned order has been passed after proper application of mind, after hearing the parties and after considering the genuine and valid objection of the defendants and the impugned order is in conformity with law. There is no illegality in the impugned order which is perfectly legal and there appears no jurisdictional error in it and hence, the impugned order needs to be sustained by this Court.

6. By way of reply learned counsel for the petitioner submitted that the learned Advocate Commissioner was appointed in presence of the contesting party and upon notice, the defendants appeared before him. Respondent nos. 2, 16 and 17 were duly served with notices. The answering respondents are trying to mislead this Court by creating story of non-service of notice to the other defendants. Thus, the answering respondents had ample opportunity to file objection before the learned Advocate Commissioner but they remained silent till final Takhtabandi. Even the objection filed is without any averment that the learned Advocate Commissioner refused to accept their objection. When it comes to the claim of the



answering respondents, the order sheet of the quasi judicial proceeding would prevail and from the order sheet of the learned Advocate Commissioner it is clear that the answering respondents were having knowledge that the learned Advocate Commissioner was proceeding ahead but they did not participate in the final Takhtabandi proceeding. Moreover, if the order sheet of the learned Advocate Commissioner is questioned at this stage, he is not in a position to defend himself. Learned counsel vehemently contended that if the answering respondents appeared even for one day before the learned Advocate Commissioner as it appears from their submission, they are barred from raising any plea regarding service of notice upon other defendants. Learned counsel reiterated that the entire objection petition is without any affidavit and is silent to the fact that the defendants have made any effort for correction in the preparation of final Takhtabandi before the learned Advocate Commissioner. Learned counsel next submitted that the learned trial court failed to appreciate all these facts and further failed to consider that the defendants were not absent from the survey proceeding and without examination of the Advocate Commissioner on the genuineness of the report, the order impugned has been passed erroneously. Moreover, no pleading



without supporting affidavit could be filed before the learned trial court in any proceeding. Learned counsel further submitted that the entire objection of the respondents is based on the fact that the properties were not properly valued and it nowhere says that the notices were not served upon non-appearing respondents. Thus, learned counsel submitted that the impugned order is illegal and not sustainable and it requires interference by this Court.

7. I have given my thoughtful consideration to the rival submission of the parties and perused the record. It would be beneficial to refer to the relevant statutory provision with regard to the appointment of local commissioner. Order 26 Rules 9, 10, 13 and 14 are relevant for the purposes of consideration of the present matter. The provisions read as under:-

**9. Commissions to make local investigations.--** *In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such*



*investigation and to report thereon to the Court:*

*Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.*

**10. Procedure of Commissioner.--** (1) *The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

**(2) Report and deposition to be evidence in suit.--** *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

**(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.*





**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 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) be 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 conjoint reading of the aforesaid provision makes it very clear that the court has requisite power to appoint a second commissioner upon setting aside the report of the first commissioner, if situation so warranted. Therefore, there could be no challenge to the authority of the court to reject the final Takhtabandi report and the order could not be challenged on this ground. The cases relied on by learned counsel for the respondents in the cases of ***M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore and others Vs. Modi Transport Service, Asifunisa and another Vs. Ali Imam and Jagdish Bhagat & Ors. Vs. Sri Baijnath Rai & Ors. (supra)*** are pointer to this fact. In a proceeding under Article 227 of the Constitution, this Court normally refrains from entering into factual aspects of the case unless there is any perversity or illegality or error of jurisdiction on part of the subordinate courts. The main contention of the learned counsel



for the petitioner is with regard to service of notice upon the answering respondents and the answering respondents not participating in the proceeding before the learned Advocate Commissioner. The learned trial court has taken into consideration the objection and thereafter, considering the iniquitous distribution of the property between different claimant when such inequality is writ large on the face of the record, it is not possible to sustain such report even if objections were not taken at the time of preparation of report of the learned Advocate Commissioner. The fact has been apparently made clear by learned trial court while passing the impugned order when it observed that the valuable and useful commercial and residential multi storied building was allotted in favour of the plaintiff in Takhtabandi whereas barren land in the bed of river Sone was allotted in favour of the respondents. It has also come in submission that some of the defendants were not even allotted shares. Based on these facts if the learned trial court found the report of the learned Advocate Commissioner to be bad and rejected the same, this Court would be most reluctant to interfere in such order.

8. Therefore, in the light of aforesaid discussion, I do not find any infirmity or error of jurisdiction in the order dated



14.10.2020 passed by the learned trial court and hence, the same is affirmed. Accordingly, the present petition is dismissed being devoid of merit.

9. However, the learned trial court is directed to immediately proceed for appointment of a new Pleader Commissioner and it is further directed that the learned Pleader Commissioner would submit the report within a month from the date of appointment after considering the objections and suggestions of the parties regarding final Takhtabandi.

**(Arun Kumar Jha, J)**

DKS/-

AFR/NAFR	AFR
CAV DATE	29.10.2024
Uploading Date	08.01.2025
Transmission Date	NA

