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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on : May 01, 2015
Judgment Pronounced on : May 15, 2015

+ **CS(OS) 2897/1996**

SH. SURESH CHAND GUPTA Plaintiff
Through: Mr. Shekhar Gupta, Advocate

versus

SH. MAN MOHAN GUPTA Defendant
Through: Mr. Pushkar Sood, Advocate for D-1.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

Objections to the report of the Local Commissioner

1. A preliminary decree was passed by this court on 10.09.2003 for the suit property No.A-44, Inder Puri, New Delhi whereby the four plaintiffs and defendant No.1 were to have equal share in the property (1/5th share each). Against the said order, defendant No.1 filed an RFA(OS)No.43/2003. The same was compromised between the parties and a compromise decree was passed on 06.02.2012 whereby the share of defendant No.1 was agreed to be 30% and plaintiffs No. 1, 2 and 3(A) to 3(C) were to respectively get 23.33% (i.e. 3A to 3C got 23.33%) Defendant No.1 challenged the compromise decree in the Supreme Court by filing a special leave petition which was dismissed on 29.10.2012. Thereafter he filed a review petition before the Division Bench which was also dismissed on 22.02.2013. He

again preferred a special leave petition against the said order which was dismissed on 26.08.2013.

2. This court vide order dated 01.05.2014 appointed Ms.Vandana Anand, Advocate as a Local Commissioner to visit the suit property and suggest mode of partition and in case it is not feasible to divide the property by metes and bounds, a specific report in this regard was to be submitted within four weeks. Against the said order dated 01.05.2014 again defendant No.1 went up in appeal being FAO(OS) 327/2014. The appeal was dismissed as withdrawn on 22.07.2014.

3. The Local Commissioner has visited the suit property and submitted her report dated 16.07.2014. She has noted that the suit property is vacant with no structure or building. She has concluded that it is not feasible to divide the suit property by metes and bounds.

4. Defendant No.1 has now filed his objections against the said report. I will now deal with the said objections.

5. Learned counsel appearing for defendant No.1 has made the following submissions as to why the report of the Local Commissioner is erroneous and should not be accepted by this court.

(i) It is urged that the report of the Local Commissioner is not accompanied by any plan of the property in question and in the absence of any plan, the Local Commissioner has failed to note that the plot has three open sides and is flanked by two roads which are 40 feet and 30 feet wide on two sides and a service lane on the third side. Hence, it is urged that the suit property can easily be partitioned into four parts and each party would be able to get an independent access. In fact, learned counsel for defendant No.1 has also submitted that if

the plot is sub-divided into four parts, he is willing to take any part.

(ii) Reliance is also placed on the settlement agreement reached between the parties before the Division Bench to contend that the settlement agreement stipulates that the plot will be divided in such a manner that 70% shall fall to the share of the plaintiffs and 30% shall fall to the share of defendant No.1. Reliance is placed on paras 3 and 8 of the compromise application. It is stated that though in para 8 of the compromise application, the parties had initially agreed that the entire plot shall be sold to one Mr.Narender Jain on the terms and conditions as agreed between the parties in the MOU dated 04.02.2012. However, it is stated that in case the sale did not go through, the settlement envisaged a division whereby the plot would be sub-divided. Ultimately the transaction with Mr.Narender Jain did not go through.

(iii) It is further stated that defendant No.1 entered into a compromise agreement because he is aged 83 years and does not keep good health and is not able to walk without assistance. He is presently said to be residing on the first floor at Patparganj and hence, it is urged that it is difficult for him to climb the stairs. Accordingly, he entered into a compromise thinking that he can get 30% share of the plot and can build his own house on the said plot and use the ground floor for his own residence. It is urged that the Local Commissioner has not taken this aspect into consideration while preparing the impugned report.

(iv) It is also urged that the property in question is a freehold property and as per the MCD Bye-Laws and the DMC Act, it can

easily be sub-divided and there is no prohibition on sub-division of the plot.

6. Learned counsel appearing for the plaintiffs has opposed the present objections. He submits that there are presently 9 plaintiffs inasmuch as plaintiff No.1 has expired on 27.10.2014 and plaintiff No.3 had expired during the pendency of the suit itself. Hence in all including defendant No.1 there are 10 parties. Some of the parties are entitled to only 9.33 sq. yards out of the 200 sq.yards area of the suit property. He submits that there is no option but to auction the suit property. He further submits that North Delhi Municipal Corporation in response to an application under the RTI Act had vide reply dated 05.11.2014 stated that the building bye-laws and building plans are not being sanctioned in respect to sub-divided plots.

7. Before coming to the merits of these objections filed by defendant No.1, I may like to comment on the conduct of defendant No.1. It is apparent from the said conduct that defendant No.1 is a habitual litigant. Before the appellate court in RFA (OS) 43/2003, the parties entered into a compromise whereby defendant No.1 was given 30% share of the suit property and the plaintiffs No.1, 2 and 3 respectively were given 23.33% share each in the suit property. Even against the said compromise decree, defendant No.1 filed a special leave petition. The said special leave petition was dismissed with liberty given to defendant No.1 to file a review petition before the High Court. A review petition was filed which was also dismissed by the Division Bench on 22.02.2013. Against the said order also defendant No.1 filed a special leave petition before the Supreme Court which was dismissed on 26.08.2013.

8. The present Local Commissioner was appointed pursuant to order

dated 01.05.2014. Against the said order appointing the Local Commissioner, defendant No.1 again filed an appeal being FAO (OS) 327/2014 which was dismissed as withdrawn on 22.07.2014.

9. The Local Commissioner has also commented that when she conducted her commission none was present for defendant No.1. On the telephone when she discussed with the counsel for defendant No.1, she was informed that defendant No.1 is not interested in the Local Commission. As consensus could not be reached on the date on which the commission could be executed, the Local Commissioner fixed 01.06.2014. The counsel for defendant No.1 objected to the said date suggesting 05.07.2014 because he or his client would not be available. However, the Local Commissioner keeping in mind that as per order dated 01.05.2014, the report was to be submitted within four weeks could not postpone the commission as desired by the counsel for defendant No.1. In case the counsel for defendant No.1 was not available for personal reasons, it was for defendant No.1 to make alternate arrangement. Despite knowing that the Local Commissioner is visiting the suit property on 01.06.2014, defendant No.1 took no steps to remain represented at the time of inspection. The Local Commissioner has also noted that defendant No.1 has not paid his share of the fees of the Local Commissioner.

10. I may note that as per the settlement agreement between the parties on the basis of which a compromise decree was passed in RFA (OS) 43/2003, the suit property was to be sold to Mr.Narender Jain on the same terms and conditions as noted in the MOU dated 04.02.2012 with the said Narender Jain. Hence, it is obvious that the parties had agreed that the property is to be sold to the buyer with whom some MOU had already been entered into. It is

a different reason that the said Narender Jain backed out on account of which the transaction failed.

11. Given the above back-ground, it is not possible to accept the contention of defendant No.1 that when the compromise was arrived at, the parties envisaged that in case Mr.Narender Jain does not buy the property, the parties had agreed that they would partition the property in the ratio of 30% : 70%. A reading of para 3 of the compromise application relied upon by defendant No. 1 does not indicate any such language in the said para that the property will only be partitioned in that proportion.

12. The relevant portion of para 3 and 8 of the compromise application reads as follows:

“3. That the parties have agreed that the suit property bearing No.A-44, Inderpuri, New Delhi belonged to Late Mr.Shambhu Mal and the same shall now stand divided and owned between the parties in the ratio of 30% share in favour of the appellant Mr. Man Mohan Gupta and the remaining 70% share shall be under the equal ownership of respondents i.e. Mr.Suresh Chand Gupta (23.33%), Mr. Mahesh Gupta (23.33%) and all the legal heirs of Late Mr. Radhey Mohan Gupta together (23.33%) and as per details hereunder:

.....

8. That it is agreed that the 30% share belonging to the appellant Mr.Man Mohan Gupta and remaining 70% share belonging to the respondents shall be sold to Mr.Narinder Jain on the terms and conditions agreed between the parties in terms of Memorandum of Understanding (MoU) both dated 04.02.2012 executed and signed between the said Mr. Narinder Jain and Mr.Man Mohan Gupta and all the respondents separately and independently.”

13. A conjoint reading of paras 3 and 8 of the compromise application does not show that the parties had envisaged the possibility where

Mr.Narender Jain would back out and not complete the sale transaction. There is nothing in these two paras to show that in the eventuality Mr.Narender Jain was to back out, the property would be necessarily physically partitioned with defendant No.1 receiving 30% of his share. The said contention has no basis and no merit.

14. As far as the objection is concerned of defendant No.1 about the absence of a site plan in the report of the Local Commission, defendant No.1 has not been able to explain as to how the property can be partitioned. Though he has argued that the local bye-laws permit sub-division, no material has been placed on record. In contrast the plaintiff has relied in court on a reply received under the RTI Act from the North Delhi Municipal Corporation dated 05.11.2014 stating that the building plans are not being sanctioned for sub-divided plots. In my opinion, there is nothing on record to show that the concerned MCD would accept a sub-divided plot. Defendant No.1 has also not been able to show that the plot could be sub-divided fairly between the parties.

15. It also cannot be ignored that two of the plaintiffs have expired and their legal representatives are on record. Each one is claiming his own share of the suit property. It would be unfair to the legal heirs of the concerned plaintiffs to insist on them to take undivided share in the suit property and thereafter, commence litigation inter se to further sub-divide their portions. Any such arrangement would be un-equitable and unfair and only lead to further litigation.

16. Admittedly, defendant No.1 is not residing in the suit property. The only contention raised of prejudice that is likely to be caused to defendant No.1 in case of public auction is that he is aged 82 years old and has to

climb a staircase in his present residence which is on the first floor. It is argued that defendant No.1 hoped to construct his house on the ground floor of the suit property on his share and that would obviate the necessity to climb stairs.

17. Firstly, no material is placed on record to show any medical reason not to climb stairs. The contention is being made without any material. The contention also appears to be misplaced. The compromise as agreed upon envisaged a sale of the suit property to Mr.Narender Jain. It did not envisage a physical partition. Hence, the contention that defendant No.1 thought that that by compromise he would get a portion of land where he could build his own house and not have to climb stairs, appears to be an afterthought and a misplaced contention. Further, in any case from the proceeds that are received pursuant to the sale, defendant No.1 can make an appropriate arrangement for a ground floor accommodation for himself. There appears to be no impediment to the same.

18. In my opinion, the objections filed by defendant No.1 lack merits and are dismissed. The report of the Local Commissioner is accepted.

19. A final decree of partition by sale of the properties is passed. Let a final decree be drawn up giving respective shares as per compromise decree dated 6.2.2012.

20. All pending applications stand disposed of.

(JAYANT NATH)
JUDGE

MAY 15, 2015
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