

A.No.7362 of 2019
in
A.No.7036 of 2017
in
C.S.No.1 of 2014

SENTHILKUMAR RAMAMOORTHY, J

This application is filed to change the Advocate Commissioner appointed by this Court by order dated 14.12.2017 and to appoint a new Advocate Commissioner to provide a report with regard to the division of the suit schedule property by metes and bounds so as to allocate the respective shares to the plaintiffs and defendants.

2. I heard the learned counsel for the applicants, the learned counsel for the respondents and the learned Advocate Commissioner.

3. The learned counsel for the applicants submitted that it is clear from the counter of the Advocate Commissioner to the present application that the Advocate Commissioner is completely biased against the applicants. In specific, the learned counsel referred to paragraphs 13 and 17 of the said counter affidavit, wherein the Advocate Commissioner stated that the plaintiff is a highly greedy person who wants to demolish the livelihood of the defendant. He also referred to the photographs that were annexed to the report dated

16.10.2019 of the Advocate Commissioner and pointed out that photographs of the other properties of the applicants, which are completely unconnected to the suit schedule property, have been unnecessarily taken by the learned Advocate Commissioner, by overreaching the scope of the warrant, and enclosed with the report. For all these reasons, he submitted that the present application is liable to be allowed.

4. In response, the learned counsel for the respondents submitted that the respondents have been residing in the suit schedule property for a very long time and that they were the first owners of the said property. As regards the applicants/plaintiffs, he pointed out that they purchased the said property from the maternal uncle and aunt of the respondents in 2009, and that, therefore, they are subsequent owners. He further submitted that the report of the Advocate Commissioner is liable to be accepted because the Advocate Commissioner has indicated a reasonable manner of division of the property in the sketch at page 19 of the typed set of papers filed by the Advocate Commissioner. By referring to the said sketch, the learned counsel submitted that this method of dividing the property is beneficial to all the parties and is in accordance with legal requirements.

5. The learned Advocate Commissioner made his submissions thereafter. He pointed out that he was appointed on 14.12.2017. Upon his appointment, he carried out the first inspection on 11.01.2018 and, shortly thereafter, a civil engineer was appointed on 19.01.2018. A second inspection was carried out by the Advocate Commissioner on 19.03.2018 and prior to that, an enquiry was also conducted on 13.03.2018. The learned Advocate Commissioner submitted that he had pointed out a discrepancy in the sale deed and requested the applicants to remedy the said discrepancy. He also submitted that the sole defendant died on 01.04.2018 and that this was promptly communicated to the applicants by the learned Advocate Commissioner. In spite of communicating the same on 1 August 2018, the applicants did not take any steps to bring the LRs on record until 07.08.2019. Consequently, the learned Advocate Commissioner submitted that he could not proceed with the further execution of the warrant until the LRs were brought on record because the defendant was unrepresented. Meanwhile, he submitted his interim report on 29.03.2019. Once the LRs were brought on record, the learned Advocate Commissioner submitted his final report on 16.10.2019.

6. As regards the report of the Civil Engineer, the learned Advocate Commissioner submitted that the four options annexed to the said Civil

Engineer's Report were inimical to the respondents inasmuch as all four options provided for a vertical division of the property, whereas it is only a horizontal division that would protect the interest of all concerned in view of the narrow passage. The learned Advocate Commissioner also submitted that the applicants had made completely false allegations against the Advocate Commissioner, including by stating that he had swallowed the fees of the Civil Engineer. For all these reasons, the learned Advocate Commissioner submitted that the applicants should be penalized. In this connection, he relied upon the judgment of the Hon'ble Supreme Court in **ASHOK KUMAR MITTAL V. RAMKUMAR GUPTA AND ANOTHER [(2009) 2 SCC 565]**, wherein, at paragraphs 5,6,7,9 and 11, the Hon'ble Supreme Court held that when the parties resort to vexatious litigation, power may be exercised under Section 35-A of the Code of Civil Procedure so as to impose compensatory costs. Based on the facts of the said case, costs were imposed and it was directed that the said payment should be made to the Delhi High Court Legal Services Committee. Likewise, in this case, the learned Advocate Commissioner submitted that the applicants should be directed to pay a sum of Rs.5 lakhs as costs to the Chief Justice's Relief Fund. In addition, the learned Advocate Commissioner prayed for additional remuneration of Rs.1 lakh plus Rs.25,000/- towards cost of enquiry and Rs.10 lakhs as damages.

7. I considered the submissions of the learned counsel for the respective parties and also that of the learned Advocate Commissioner and examined the records.

8. I find that the learned Advocate Commissioner had informed the applicants about the death of the defendant on 1st August 2018. In spite of the same, the applicants clearly delayed the process of bringing the LR's of the defendant on record and thereby protracted the process of execution of the warrant. Consequently, the interim report of the learned Advocate Commissioner was submitted on 29.03.2019 and the final report on 16.10.2019 after the LR were impleaded on or about 07.08.2019. I also find that the Civil Engineer submitted a report on 29.03.2019 annexing sketches wherein four options were set out with regard to the division of the property. However, by final report dated 16.10.2019, the learned Advocate Commissioner did not concur with or accept the said four options for the reasons set out in the said report. Instead, the learned Advocate Commissioner annexed the sketch at page 19 of the typed set of papers whereby the learned Advocate Commissioner suggested a horizontal division of the suit schedule property and suggested that the rear portion should be allotted to the respondents. Thus, it is clear that the reports of the Civil Engineer and the learned Advocate

Commissioner are completely contrary with regard to the recommendations made for effecting the partition. While the recommendations of the Civil Engineer, as regards division of the property, are acceptable to the applicants, the respondents are unwilling to accept the same. On the other hand, the learned Advocate Commissioner's recommendation is acceptable to the respondents but it is completely unacceptable to the applicants, who, consequently, filed this application. In this situation, there is no doubt that the manner of division of the suit schedule property should be re-visited. The question that remains to be considered is whether a new advocate commissioner should be appointed for this purpose. In the counter affidavit to this application, the learned Advocate Commissioner stated expressly and categorically that the first plaintiff is a highly greedy person who wants to demolish the livelihood of the defendant by insisting on a vertical division of the suit schedule property. I am conscious of the fact that these statements were made after the applicants levelled completely unsubstantiated allegations against the learned Advocate Commissioner that he had swallowed the fees of the Civil Engineer. Nonetheless, the learned Advocate Commissioner should not have passed judgment on the nature and character of the applicants and, as a consequence, an extension of his warrant would not be in the interest of justice. In this regard, the learned Advocate Commissioner

also submitted that he completed the work under the Commission and filed a final report on 16.10.2019 and that he does not want to continue any longer.

9. In view of the fact that the Engineer's report and the report of the learned Advocate Commissioner are completely contrary with respect to the manner of dividing the property and the two contesting parties are also unable to reach a consensus, in this regard, it is necessary to appoint a new advocate commissioner.

10. Nevertheless, the learned Advocate Commissioner who executed the warrant is also required to be properly remunerated for his services. I find that the learned Advocate Commissioner carried out the inspections on 11.01.2018 and 19.03.2018 and also conducted an enquiry on 13.03.2019. Pursuant to the above, he submitted the interim report on 29.03.2019 and the final report dated 16.10.2019. Keeping in mind the above services and also the fact that the warrant was executed over a period of two years, the applicants are directed to pay a sum of Rs.75,000/- [Rupees Seventy Five Thousand only] as additional remuneration to the learned Additional Commissioner.

11. As regards the payment of damages and costs, I find that the applicants protracted the execution of the warrant by not bringing the LRs on record for at least one year. However, I find that this Court by order dated 07.08.2019 condoned the said delay for reasons stated in the said order dated in A.No.4664 of 2019. Therefore, I do not propose to re-visit the said matter. Accordingly, this application is disposed of by issuing the following directions:

(a) The applicants shall pay a sum of Rs.75,000 as additional remuneration to the learned Advocate Commissioner within a period of four weeks from the date of receipt of a copy of this order.

(b) R. Palaniandavan, 770 A, Lower Ground Floor, Dewa Towers, Anna Salai, Chennai-600 002, mobile No.9884110509, is appointed as the new Advocate Commissioner to inspect the suit schedule property and submit a report with regard to divisibility of the said property and the manner of such division. The said warrant shall be executed on or before 31.03.2020. The applicants shall pay the learned Advocate Commissioner a sum of Rs.30,000/- as initial

*remuneration within two weeks from the date of
receipt of a copy of this order.*

12. It is brought to my notice by the learned counsel for the respondents that only a preliminary decree was passed in this matter whereas the petitioner submitted that the Registry is proceeding on the assumption that a final decree was issued on 24.01.2017. It is hereby clarified that no final decree was passed in this matter and the learned Advocate Commissioner is being appointed as a preliminary step before an application for final decree would be filed.

List the matter on 02.04.2020.

06.02.2020

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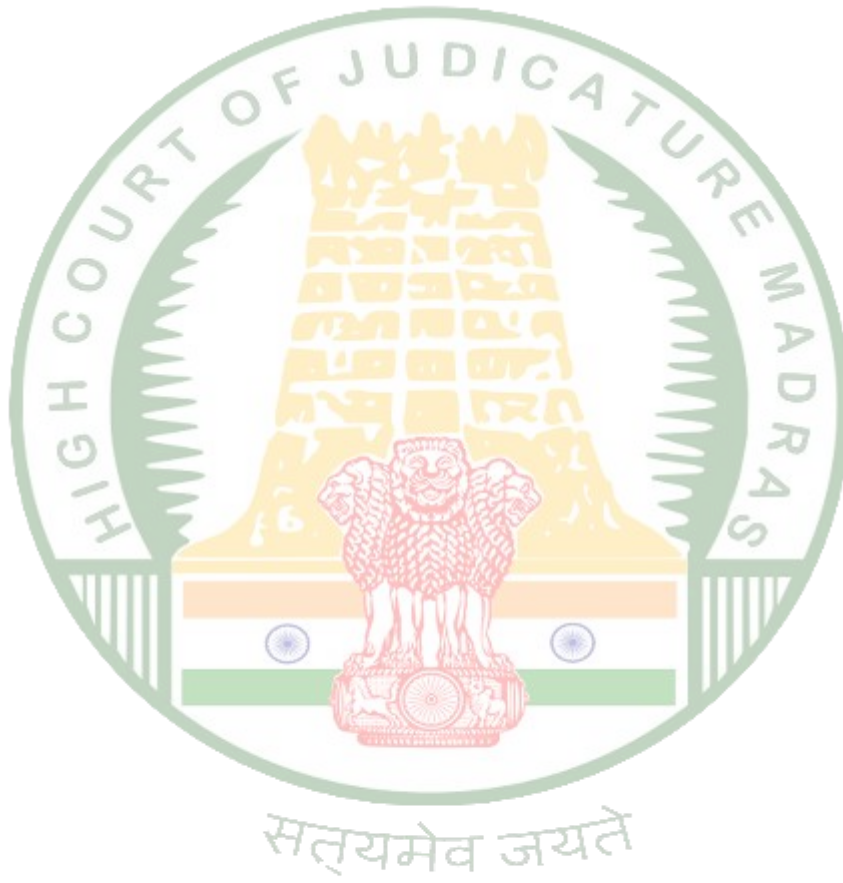
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