

Reserved on	23.08.2021
Pronounced on	24.09.2021

A.No.901 of 2021 in
C.S.No.142 of 2019

V.PARTHIBAN. J.,

The Applicants herein are the plaintiffs in the suit. The suit was filed for partition of the schedule properties and in the suit, three applications in O.A.Nos.165, 166 & 167 of 2019 have been filed. In response to the Applications, the respondents/defendants filed their counter and in the counter, they have admitted that item Nos.1, 2, 3, 5 & 7 of the suit schedule properties are amenable to partition, as co-owners of the properties.

2.In view of the stand taken by the respondents/defendants, an Application in A.No.2674 of 2020 was filed under Order XII Rule 6 of the Civil Procedure Code, 1908, seeking for grant of preliminary decree based on the admission of the parties. The Application was allowed by this Court on 14.12.2020 and a preliminary decree was granted in respect of item Nos.1, 2, 3, 5 & 7 into two equal shares between the contesting parties.

3.According to the applicants herein, that after the grant of the preliminary decree on 14.12.2020, the first respondent/defendant was

not showing any inclination for dividing the properties and left with no other alternative, the applicants have filed the present application for appointment of Advocate Commissioner to divide the item Nos.1, 2, 3, 5 & 7 as mentioned in the suit schedule properties and as per the preliminary decree passed by this Court on 14.12.2020.

4.Mr.Avinash, learned counsel for the applicants would submit that the present Application has been necessitated in view of the attitude of the first respondent/defendant in not showing any inclination towards actual partition of the suit properties, despite the preliminary decree granted by this Court on 14.12.2020. Unless, the suit schedule properties in item Nos.1, 2, 3, 5 & 7 are divided by metes and bounds, the fruits of the preliminary decree could not be realized by all the parties.

5.On behalf of the respondents/defendants Mr.G.R.M.Palaniyappan, learned counsel appeared and opposed the Application. At the outset, he would submit that there is no requirement for appointment of Advocate Commissioner for dividing the properties by metes and bounds, as the properties are already under the independent enjoyment of the respective parties for very many years.

6.The learned counsel would submit that in regard to item Nos. 1 & 2, the respondents have been occupying the first and third floor and have been enjoying the same for quite sometime. As far as the ground, second and fourth floors are concerned, the applicants have been living there, independently enjoying possession of the same. As far as item No.3 is concerned, ground floor is being occupied, enjoyed by the respondents/defendants, the first floor by the applicants/plaintiffs and the second floor is occupied by the staff employed by both the applicants and the respondents.

7.According to the learned counsel as regards item Nos.1 & 2, partition has already been effected and the same is being enjoyed by the parties accordingly. The learned counsel would refer to averments contained in paragraph 9 of the plaint, wherein, the plaintiffs have admitted that as far as the business in Pandy Bazar, T.Nagar, they are in occupation of the basement, first and third floors and the first respondent is carrying on his business by occupying the ground, second and fourth floors. In that case, there is no requirement for appointment of Advocate Commissioner for effecting partition, as the parties have already accepted their independent possession and enjoyment of the properties in respect of various items, which are the subject matters of this Application.

8. According to the learned counsel, as far as item Nos.5 and 7 are concerned, they are vacant lands and no purpose would be served for the Advocate to go, visit and inspect the property. The learned counsel therefore submitted that no further partition is required in respect of item Nos.1 to 3 in the schedule mentioned properties.

9. The learned counsel also submitted that as against the preliminary decree, an appeal in O.S.A.No.228 of 2021 has been filed and the Division Bench of this Court has granted stay of passing of final decree. In that view of the matter also, there is no requirement for ordering this Application at this stage. According to him, when preliminary decree itself is under challenge, the Application for appointment of Advocate-Commissioner being an independent Application cannot be sustained in law and therefore, he would implore this Court to reject the Application.

10. At this the learned counsel for the applicants/plaintiffs would also refer to paragraphs 4 & 6 of the judgment passed by the learned Judge of this Court in A.No.2674 of 2020 in C.S.No.142 of 2019 granting preliminary decree on 14.12.2020. The learned Judge though referred to the Application and the counter filed on behalf of the

respondents/defendants, but however, despite the resistance put up by the respondents/defendants felt that there was no point in relegating the suit for trial as far as admitted share in respect of certain properties. In fact, the learned Judge has specifically concluded in paragraph 7 of the Judgment that though it was contended by the first respondent that in the year 2006, after the death of the father, the partition has been effected between them and when the Court posed a question as to the mode of partition, it was submitted that it was only an oral partition. The learned Judge also found that there was no whisper in the entire pleading as to the date on which oral partition took place. The learned Judge further held that any property allotted orally, if the property is valued more than Rs.100, it requires compulsory registration otherwise such partition is not valid in the eye of law.

11. In view of the categorical findings by the learned Judge, the pleadings of the respondents/defendants that there was no requirement for appointment of Advocate Commissioner for dividing the property by metes and bounds, cannot be countenanced both in law and on facts. The learned counsel would therefore submit that the Application may be ordered as prayed for.

12.Considered the submissions of the learned counsel appearing for the parties and perused the material placed on record.

13.The principal contention for resisting the present Application for appointment of Advocate Commissioner is that the parties have been enjoying independently the properties mentioned in item Nos.1, 2, 3, 5 & 7 for very many years and hence, there was no requirement for dividing the property by metes and bounds. This contention of the learned counsel on behalf of the first respondent/first defendant was negated categorically by the learned Judge who passed a preliminary decree on 14.12.2020. The so called oral partition effected between the parties was held to be not valid in the eye of law. Moreover, the learned Judge also held that it was not factually established by the respondent/defendant that partition between the parties had been effected and acted upon. In face of the clear findings of the learned Judge, opposing the ordering of the Commissioner Application is devoid of merits and substance.

13.Although the learned counsel for the respondents/defendants painstakingly asserted before this Court once again about the occupation of the premises independently and enjoyment of the same by the respective parties and also the

enjoyment of the common properties in the premises, this Court is unable to countenance the contention in the absence of any materials in support of the assertion. In the said circumstances pursuant to the preliminary decree granted by this Court on 14.12.2020, the properties as mentioned in the schedule need to be divided by metes and bounds in furtherance of the preliminary decree granted by this Court. Merely, on the basis of bald statements made by the respondents/defendants that partition has already been in place between the parties, the application for appointment of Advocate Commissioner cannot be rejected. If the Courts were to take a final call on the self serving averments and submission of the respondent/defendant, that would amount to passing final decree based on such partisan claims.

14. Moreover, this Court having discountenanced such submission earlier made when the preliminary decree was granted by this Court, it does not lie in the mouth of the respondents/defendants to put forth the same claim before this Court. In fact, the learned counsel for the respondents/defendants has also contended as to the fact of filing and pending of O.S.A.No.228 of 2021 against the grant of preliminary decree and stay by the Division Bench of this Court. This Court is informed that the Division Bench has granted only stay of passing of final decree but it has not stayed the preliminary decree as

such, therefore, there is no bar for this Court to consider the present Application for seeking appointment of Advocate Commissioner.

15.In any event, the division of properties by the Advocate Commissioner by metes and bounds is not going to upset the status quo of the occupation of the parties as that would be the subject matter of consideration while the final decree will be passed in the suit.

16.The learned counsel for the applicants/plaintiffs has also referred to Order XXVI Rule 13 and also Section 24 of C.P.C. Under Order XXVI Rule 13 C.P.C., a commission may be issued to make the partition or separation according to the rights as declared in such decree. The appointment of Advocate Commissioner becomes legally imperative in the absence of accepted and admitted rights of parties to enjoy a definite share of property in the joint family properties. The learned counsel also referred to a decision reported in **2017 SCC Online Mad 605 [G.Vasantha v. Sri Maharaja Kailash Benefit Fund Ltd.,]** but this Court does not think that the decision is having any relevance to the facts of the present case. In the light of the above consideration, the Application is therefore liable to be allowed.

17.Mr.Karunanidhi, Advocate (Mob: 9444066853), having office at Flat No.D.3, Yes Yes Villa, No.15-B, Reddy Street, Virugambakkam, Chennai - 600 092 is hereby appointed as Advocate Commissioner.

(a)The learned Advocate Commissioner is directed to inspect the schedule properties in item Nos.1, 2, 3, 5 & 7 and divide the same into equal shares and allot one each share to the applicants/plaintiffs and the first respondent/first defendant in terms of the preliminary decree passed by this Court on 14.12.2020 in A.No.2674 of 2020 in C.S.No.142 of 2019.

(b)The learned Advocate Commissioner after dividing the properties by metes and bounds is directed to submit a report before this Court.

(c)In discharge of his assignment, the learned Commissioner is also at liberty to take the assistance of any professional for dividing the properties by metes and bounds.

(d)The learned Advocate Commissioner is directed to give notice to the counsels as well as to the parties before making inspection of the properties for the above purpose.

(e)The initial remuneration for the Advocate Commissioner is Rs.1.25 Lakhs to be borne by the parties equally and the same shall be paid to him at the time when the parties receive preliminary notice of inspection by him.

(f)Any expenses/profession charges payable to appointment of the expert in the process of execution of the warrant of the Court shall be borne by the parties equally.

(g)The Advocate Commissioner is also entitled to any other incidental expenses he may incur in the discharge of his assignment.

(h)The parties are directed to extend utmost cooperation to the Advocate Commissioner in discharge of his duties.

Post the matter for further hearing on 20.10.2021 and for filing report of the learned Advocate Commissioner.

24.09.2021

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