



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2023

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

and

CMP.Nos.1968, 1979, 1981, 1982, 1983, 1984, 1986, 1987, 1989, 1992,
5834, 5835, 5843, 5845 and 5856 of 2022

Selvi

.. Appellant in all appeals

Versus

1. C.S. Geethalakshmi
2. Radhika Santhanakrishnan @ S. Radhika
3. Vasanthi Udayasuryan
4. C.S. Sunitha

.. Respondents in all appeals

O.S.A. No. 20 of 2022:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the Order and Decree dated 22.10.2021 passed in Application No. 2009 of 2020 on the file of this Court.

O.S.A. No. 21 of 2022:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the Order and Decree dated 22.10.2021 passed in Application No. 2008 of 2020 on the file of this Court.



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

O.S.A. No. 22 of 2022:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the Order and Decree dated 22.10.2021 passed in Application No. 6321 of 2019 on the file of this Court.

O.S.A. No. 23 of 2022:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the Order and Decree dated 22.10.2021 passed in Application No. 2010 of 2020 on the file of this Court.

O.S.A. No. 24 of 2022:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the Order and Decree dated 22.10.2021 passed in Application No. 6322 of 2019 in Civil Suit No. 240 of 2019 on the file of this Court.

For Appellants : Mr. S.Rajendra Kumar for
Mr. Prashant Rajagopal

For Respondents : Mr. K.Balamurali for
M/s.Shivakumar & Suresh

COMMON JUDGMENT

(Judgment of the Court was delivered by **R.MAHADEVAN, J**)

The Plaintiff in C.S. No. 240 of 2019 is the appellant in all these appeals. These appeals are filed as against the common order dated 22.10.2021 passed by the learned Judge in the original applications filed in the said suit.



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

WEB COPY

2. The appellant / plaintiff has instituted the suit in C.S. No. 240 of 2019 for granting a preliminary decree of partition of the properties morefully set out in the plaint schedule.

3. In the suit, a preliminary decree for partition was passed on 19.06.2019 and final decree application was filed. Pending the final decree proceedings, five applications have been filed, which are the subject matters of these appeals.

4. Out of the five appeals, O.S.A. No. 20 of 2022 was filed as against the order dated 22.10.2021 passed in Application No. 2009 of 2020. This application was filed by the defendants 1 to 4 praying to issue a direction for sale of the Schedule A Property by public auction by appointing an advocate commissioner and directing the Advocate Commissioner to deposit the sale proceeds to the credit of C.S. No.240 of 2019 and on conclusion of sale to pass appropriate orders with regard to distribution of the sale proceeds.

5. O.S.A. No. 21 of 2022 was filed as against the order dated



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

22.10.2021 passed in Application No. 2008 of 2020. This application has been filed by the defendants 1 to 4 praying to vacate the interim injunction granted on 19.06.2019 in O.A. No. 370 of 2019 in C.S. No. 240 of 2019, while passing the preliminary decree in the suit.

6. O.S.A. No. 22 of 2022 was filed as against the order dated 22.10.2021 passed in Application No. 6321 of 2019. This application was filed by the defendants 1 to 4 to appoint an advocate commissioner to inspect the schedule A mentioned property and divide the same by metes and bounds into four shares by equal value and allot the share to the applicants/defendants 1 to 3 and plaintiff.

7. O.S.A. No. 23 of 2022 was filed against the order dated 22.10.2021 passed in Application No. 2010 of 2020. This application was filed by the defendants 1 to 4 praying to conduct an enquiry as to mesne profits payable by the plaintiff to the applicants 1 to 3/defendants 1 to 3 in respect of the Schedule A Property under Order XX Rule 12 of the Code of Civil Procedure in terms of the preliminary decree dated 19.06.2019 passed in C.S. No. 240 of 2019.



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

WEB COPY

8. O.S.A. No. 24 of 2022 was filed as against the order dated 22.10.2021 passed in Application No. 6322 of 2019 in Civil Suit No. 240 of 2019. This application has been filed by the defendants 1 to 4 praying to pass a final decree to partition of the Schedule A mentioned property by metes and bounds and put the applicants 1 to 3/defendants 1 to 3 and plaintiff in possession in respect of their allotted 1/4 share in the same and also allot respective share in the Schedule D & E Properties to the applicants/defendants 1 to 3 and the plaintiff.

9.1. The Plaint averment shows that the plaintiff and the defendants 1 to 3 are the children of Mr. T. Shanmugam and Mrs. T.S. Lakshmi. The fourth defendant is the daughter of the first defendant. According to the plaintiff, the Schedule A Property was purchased by her mother Lakshmi and her sister Kasturi Palani jointly by way of a sale deed dated 30.09.1973 registered as document No. 1751 of 1973 on the file of Sub-Registrar, Mylapore. Subsequently, Kasturi Palani settled her half share in the Schedule A Property in favour of her mother Lakshmi Ammal through a settlement deed dated 08.04.2009, which is morefully mentioned as Schedule C



Property in the plaint. Thus, the mother of the plaintiff has become the owner of the Schedule A property in entirety. It is further stated that the mother of the plaintiff, out of love and affection, had executed four settlement deeds all dated 08.04.2009 whereby she had settled 20% of the undivided share in favour of the plaintiff and defendants 1 to 3 and retained 20% with herself in respect of Schedule B Property.

9.2. The Plaint further proceeds to state that the father of the plaintiff and defendants 1 to 3 by name Shanmugam had a shop in the Schedule A Property and subsequently, the shop was taken over by the plaintiff out of sentiment. It is also stated that the plaintiff had taken care of her parents during the evening of their life and out of love and affection, their parents have handed over the shop in the front portion of Schedule A Property to her during December 2000 and she has been running the shop in the name and style of "Selvi Stores" selling brass pooja items and other household essentials.

9.3. It is also stated in the plaint that the mother of the plaintiff T.S. Lakshmi died intestate on 23.08.2010 and on 06.02.2015 her father Shanmugam passed away. Thus, the plaintiff and defendants 1 to 3 have succeeded to the estate of their parents. While so, on 22.12.2018, the plaintiff



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

came to know that the Schedule A Property is sought to be alienated without her knowledge and consent and therefore on 31.12.2018 and 02.01.2019, she sent a e-mail requesting the defendants to come forward to amicably partition the Schedule A Property. The Plaintiff also sought for partition of the 20000 ITC shares in the name of their parents and other shares in which investment was made, which are morefully set out in the 'D' schedule in the plaint. However, on 28.08.2018, a communication was sent to the plaintiff intimating that the value of the shares in the Demat Account of her father had been transferred to the account of the fourth defendant as she was nominated as nominee by the plaintiff's father.

9.4. On 05.01.2019, the plaintiff sent a legal notice calling upon the defendants to amicably partition the Schedule A Property and other movables in the name of her parents. However, a reply notice dated 14.01.2019 was sent stating that already, through a family arrangement made on 08.08.2002, all the movable and immovable properties have been duly partitioned and refused to accede to the plea of the plaintiff. Thereafter, the plaintiff had instituted the suit for partition of the properties set out in A to E Schedules of the plaint.



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

WEB COPY

10. A written Statement was filed by the defendants along with a counter-claim and repudiating the various averments made in the plaint *inter alia* claiming *mesne* profits in the schedule A property and to restrain the plaintiff from alienating or encumbering the same or letting out any portion thereof or in any manner altering, painting or doing any structural modification or reinforcement of the Schedule A Property.

11. By considering the averments made in the plaint and in the written statement, this Court passed a preliminary decree dated 19.06.2019 for partition holding that the plaintiff and defendants 1 to 3 are entitled to 1/4 share in the properties described in the plaint.

12. Admittedly, as against the order dated 19.06.2019 granting a preliminary decree in the suit, neither the plaintiff nor the defendants have filed any appeal and it has become final.

13. After passing the preliminary decree, Application No. 6321 of



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

2019 has been filed for appointment of an advocate commissioner. On 06.11.2019, this Court appointed an advocate commissioner, who, after notice to the parties, inspected the plaint described property on 16.11.2019 and submitted his report on 20.11.2019. The advocate commissioner, while concluding that the property is not feasible for division into four equal shares, valued the property at Rs.8,81,00,000/-.

14. As against the report dated 20.11.2019 of the advocate commissioner, specifically with respect to the finding that the suit property is not divisible into four equal shares and that, the sale of the property and distribution of the sale proceeds would be beneficial to all the parties, the plaintiff filed her objection stating that the conclusion reached by the advocate commissioner is erroneous and that the suit property is feasible for division. The plaintiff therefore requested to review the entire matter afresh.

15. Taking note of the objections raised by the plaintiff, this Court appointed another Advocate Commissioner on 19.04.2021. The second advocate Commissioner also inspected the property and submitted a detailed inspection report on 29.07.2021. In his report dated 29.07.2021, the second advocate commissioner opined that the property can be divided as per the plan provided by the Valuer, however, such division would result in



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

diminishing of 36% value of the property as a whole. Therefore, it was suggested that division of the property into four equal shares will not benefit any one of the parties, including the plaintiff. Ultimately, the second advocate commissioner fixed the value of the property at Rs.11,54,00,000/- as against the value of Rs.8,81,00,000/- fixed by the former commissioner.

16. The Plaintiff has submitted her objection to the report of the second advocate commissioner in terms of the valuation arrived at as also the opinion that the property can be divided, provided the parties are ready to lose 36% of the land value. It was also stated that the first advocate commissioner arrived at the value of the property only at Rs.8,81,00,000/-, whereas the second advocate commissioner assessed the value at Rs.11,54,00,000/-. According to the plaintiff, the difference of value arrived at by the Commissioners within a span of two years is unpredictable especially when the value of the property in and around the locality had diminished due to the Pandemic and lack of money circulation in the market. While so, the value arrived at by the second advocate commissioner in his report is illusionary.

17. On the other hand, the defendants, in response to the report of the



second advocate commissioner, submitted that the report clearly pointed out the fact that division of the property will not be beneficial to the parties. If the property will lose 1/3rd of its land value, dividing it among the four sharers is certainly not intended. It was also stated that the plaintiff cannot be heard to object to the repeated report of the Commissioners appointed by this Court depriving the fruits of the preliminary decree in favour of the defendants. Therefore, on behalf of the defendants, it was suggested that the property can be sold in public auction and the proceeds realised thereof can be distributed equally among the plaintiff and defendants 1 to 3.

18. The learned Judge had taken up the Application Nos. 2008 to 2010 as well as Application Nos. 6321 and 6322 of 2019 in C.S. No. 240 of 2019, heard the submissions of the counsel on both sides and passed the order dated 22.10.2021. The relevant portion of the order dated 22.10.2021 reads as follows:

"13. As rightly contended by the learned counsel for the applicants/ defendants in the suit, the plaintiff cannot be allowed to question the Advocate Commissioners report unless solution is offered which is acceptable to all the parties concerned. Merely placing objections and questioning the valuation and conclusion reached by the Advocate Commissioner, not once, but twice, the plaintiff is only acting against the interest of all other three shareholders. In fact, in the process she is acting against her own interest. This Court is unable to countenance the so called objections raised against the second advocate Commissioner's report in the face of a detailed scientific valuation



WEB COPY

which has been undertaken by the second Advocate Commissioner and also his conclusion appears to be well founded.

14. This Court, under Section 2 of the Partition Act, is empowered to direct sale of the property and resultant distribution of proceeds to all the shareholders. Section 2 of the Partition Act, 1893 reads as follows:-

"2. Power to Court to order sale instead of division in partition suits:-Whenever in any suit for in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards direct a sale of the property and a distribution of the proceeds."

15. This Court, in terms of the above quoted provision, is fully convinced and persuaded to hold that the division of Schedule Property does not secure the interest of the shareholders including the plaintiff and the sale of the property, disbursement of the sale proceeds would alone be beneficial to all the shareholders.

16. Having concluded as above, this Court has no hesitation in holding the objections filed by the plaintiff to the Advocate Commissioner's report, are completely bereft of any merit and substance. When the preliminary decree has been passed as early as on 19.06.2019, passing of final decree cannot be unduly delayed at the instance of one shareholder, who appear to be bent on stalling the process of final decree to be granted by this Court. The obdurate propensity exhibited by the plaintiff against the interest of other three shareholders cannot be allowed to prevail, as it is detrimental to the interest of both co-sharers towards their rightful realisation of the fruits of the sale proceeds from the subject property.

17. For all the aforesaid reasons, this Court has no hesitation in allowing the application in A. No. 2009 of 2020 filed by the applicants/defendants. This Court hereby appoints Mr. K. Elangoo



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

(phone No. 9940641919) as the Advocate Commissioner to conduct public auction for sale of Schedule 'A' property on the following conditions:-

....."

The aforesaid order of the learned Judge is put to challenge in these appeals by the plaintiff.

19.1. Assailing the aforesaid order, the learned counsel for the appellant / plaintiff submitted that the plaintiff is residing in the Schedule A property for several years and she had sentimental values attached to it. Further, the Schedule A Property was in possession of her ancestors for several years and after their lifetime, she continued to remain in possession of the same. The plaintiff is running a business in the name and style of "Selvi Stores" for the past 24 years.

19.2. The learned counsel for the appellant / plaintiff also submitted that the learned Judge did not take note of the fact that Section 2 of the Partition Act, 1893 was not complied with before directing sale of the property by public auction. When there is feasibility for division of the property, the learned Judge, without directing the parties to explore the possibility of division among themselves, hastily ordered the sale of the property by public sale which is against the interest of the plaintiff. The



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

learned Judge also did not notice that the plaintiff is residing in the Schedule A Property for several years and carrying on business there, while so, division of the property will augur well in favour of the plaintiff instead of ordering to sell the property in public auction to third parties.

19.3. The learned counsel for the appellant / plaintiff invited the attention of this Court to the common order dated 22.10.2021 of the learned Judge and pointed out that the learned Judge did not render any finding to the effect that the Schedule A Property is not feasible of being divided by metes and bounds. Similarly, there are no findings rendered to the effect that the sale of the property and distribution of the proceeds is the only option and it would be beneficial to all the parties.

19.4. It is the further submission of the learned counsel for the appellant / plaintiff that before directing sale of the Schedule A Property, the learned Judge did not provide sufficient time or examined as to whether the plaintiff, who is residing in the Schedule A Property, is ready and willing to buy the remaining portion of the property. Further, the learned Judge simply accepted the valuation assessed by the second advocate commissioner as the benchmark for determining the market value of the property. The fact remains that there is no evidence made available to show that the market



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

value assessed by the second advocate commissioner is based on a scientific evaluation. The learned Judge accepted the valuation mentioned in the report of the second advocate commissioner as gospel truth and directed the sale of the property by fixing the amount as upset price. The learned Judge failed to appreciate that the doctrine of pre-emption requires that the appellant, who is already running a business in the Schedule A Property, has got every right to pre-emption to retain her share instead of allowing it to be sold in public auction. In any event, the order passed by the learned Judge, appointing an advocate commissioner, to sell the Schedule A Property in public auction is uncalled for. Instead, the learned Judge ought to have explored the possibility of division of the property by metes and bounds. The plaintiff is carrying on business in the Schedule A Property in an area measuring 250 square feet and therefore ought to have allotted 1/4th share in her favour by including the shop, where she is currently running the business. In this context, the learned counsel for the plaintiff placed reliance on the decision of the Honourable Supreme Court in ***Rani Aloka Dudhoria and others vs. Goutam Dudhoria and others [(2009) 13 Supreme Court Cases 569]*** wherein it was held that when a property is put to auction in a suit for partition, the



provisions of the Partition Act, indisputably, shall apply. It was further held that Section 3 of the said Act envisages sale of the property within the shareholders and it does not debar a shareholder from taking part in auction *inter alia* on the premise that the shareholder may be interested in keeping the property to himself. In Para Nos.48 and 49 of the said judgment, it has been observed as under:

"48. Section 2 of the Partition Act, 1893 provides that whenever in a suit for partition in which, if instituted prior to the commencement of the Act, a decree for partition might have been passed, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale thereof subject to the condition that the request therefore had come from a shareholder or shareholders interested individually or collectively to the extent of one moiety or upwards. What therefore was necessary is that there should be a request from a shareholder; a formal prayer to that effect may not be necessary; a positive finding that the property is incapable of division by metes and bounds would be necessary and that the property cannot be reasonably or conveniently be partitioned.

*49. Section 3 of the Act envisages sale of the property within the shareholders. It unlike the provisions of the Code of Civil Procedure, does not debar a shareholder from taking part in auction *inter alia* on the premise that the shareholder may be interested in keeping the property to himself. A balance must be struck in regard to the individual interest of the shareholder having regard to the conflicting interest in the respective bids vis-a-vis the value of the property."*

19.5. The learned Counsel appearing for the appellant / Plaintiff also invited the attention of this Court to the affidavit dated 05.08.2022 filed by



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

the plaintiff in the present Original Side Appeal Nos. 20 to 24 of 2022 wherein, she has expressed her inclination to purchase another 1/4 share of the suit property from the defendants 1 to 3, apart from the 1/4th share to which she is entitled. The relevant portion of the affidavit of the plaintiff reads thus:-

"4. I am entitled to 1/4th share of the property as one of the legal heirs and now I am ready and willing to purchase another 1/4th share out of the remaining 3/4th share of the suit property. I stated that "Selvi Stores" is my livelihood and my husband and myself do not have any other source of income. I state that all my three sisters i.e., the respondents 1 to 3 are well settled are in abroad most of the days. It was my husband and myself who was taking care of my parents especially my father who was suffering from Alziemer disease due to which we took care of him till his life time. It was my husband and myself who did all the last rituals to my father. The suit property is maintained by my husband and myself till date. I state that my father had shares in Asian Paints and ITC worth several lakhs. Further the month rent till date is promptly deposited to the respective accounts of the respondents 1 to 3.

5. I am filing this Additional Affidavit without prejudice to my other contentions raised in the affidavit and grounds in the above said Appeals O.S.A. Nos. 20 to 24 of 2022, which may be read as part and parcel of this affidavit. This affidavit is filed before this Honourable Court to permit me to purchase 1/4th share of the suit property out of the remaining 3/4th share. Thereby apart from my 1/4th share which I am legally entitled to, on purchase of another 1/4th share, I will be entitled to half share of the total property. In fact to purchase the other 1/4th share itself I have to mobilise funds for which I need enough time as I do not have sufficient funds. I am unable to buy the remaining half share due to my inability to mobilise the necessary funds.

Hence, it is humbly prayed before this Honourable Court that I may be permitted to purchase 1/4th share of the suit property out of the remaining 3/4th share as I am already entitled to 1/4th share of the property which I am legally entitled to in the suit property thereby I will



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

be entitled to half share of the suit property and thus render justice."

WEB COPY

19.6. By pointing out the aforesaid affidavit of the appellant / plaintiff, the learned counsel for the appellant / plaintiff would submit that sufficient time may be given to enable the plaintiff to mobilise the money and to buy another 1/4th share in the property, apart from the 1/4th share which she is lawfully entitled to. The interest of the plaintiff to remain in the property also, has to be considered before resorting to public sale of suit property to third parties. Accordingly, the learned counsel prayed for allowing these Original Side Appeals by setting aside the order passed by the learned Judge.

20.1. Per contra, the learned counsel for the respondents/defendants would submit that the defendants 1 to 3 are co-sharers and/or decree holders in the present case. After passing of the preliminary decree, the defendants 1 to 3 are eagerly awaiting for the outcome of the final decree proceedings, but it is being stalled by the plaintiff by citing one reason or the other. From the order dated 22.10.2021, it could be inferred that this Court appointed the second advocate commissioner, at the instance of the plaintiff. The Plaintiff has objected to the report of the second advocate commissioner as well without coming out with facts and figures as to how the property could



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

amicably be divided among the plaintiff and defendants 1 to 3. The advocate commissioner in his report has categorically stated that the Schedule A Property is not feasible for division into four equal shares. The offer made by the plaintiff to purchase another 1/4 share in the suit property cannot be accepted when the property itself is not feasible for division. The plaintiff has not come up with ways and means as to how the property could be divided in the first instance, but expresses her inclination to purchase only 1/4th share out of the remaining 3/4th share. If the plaintiff is allowed to purchase yet another share of the defendants 1 to 3, then, how the remaining two shares could be divided among the defendants is unknown. Thus, the claim of the plaintiff is bald, vague and is intended to drag on the final decree proceedings and thereby frustrate the defendants.

20.2. The learned counsel for the respondents invited the attention of this Court to the order dated 16.03.2022 passed by this Court in the present appeals, whereunder, this Court recorded that the defendants have already deposited a sum of Rs.60,00,000/- by way of demand draft towards Earnest Money Deposit for the auction sale fixed by the advocate commissioner. By pointing out the above order, the learned counsel submitted that substantial amount has already been deposited by the defendants to show their



bona fide. On the other hand, the plaintiff is not resourceful enough to mobilise the amount payable to the defendants, even to purchase 1/3rd share allotted to the defendants 1 to 3. The attempt made by the plaintiff has already been deprecated by the learned Judge while passing the order, which is impugned in these appeals. Notwithstanding the same, the plaintiff has come forward with these appeals only to gain time. The claim of the plaintiff is not *bona fide* and therefore, without any further delay, the Advocate Commissioner must be permitted to go ahead with the auction sale of the property in question in accordance with law. The learned counsel for the respondents therefore prayed for dismissal of these appeals.

21. We have heard the learned counsel for the appellant / plaintiff and the learned counsel for the respondents/defendants and also perused the materials placed on record.

22. The plaintiff has filed the suit in C.S. No. 240 of 2019 for partition of the plaint mentioned property into metes and bounds. The plaint was resisted by the defendants by filing written statement, besides filing a



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

counter-claim, for *mesne* profits from the plaintiff in respect of the Schedule

A mentioned property *inter alia* to restrain the plaintiff from in any manner altering or taking up structural modification of the said property. By considering the plaint averments as also the defence raised by the defendants, a preliminary decree was passed on 19.06.2019 holding that the plaintiff and defendants 1 to 3 are entitled to 1/4 share each in the plaint described properties. The preliminary decree has been accepted by the plaintiff as well as the defendants and none of them have filed any appeal thereagainst.

23. For the purpose of passing a final decree, based on the preliminary decree passed in the suit, an advocate commissioner was appointed by this Court. The advocate commissioner inspected the plaint described property on 16.11.2019 and submitted his report on 20.11.2019. According to the Advocate Commissioner, the plaint described property is not feasible for division into four shares for the plaintiff and defendants 1 to 3 and therefore, in the fitness of things, it would be appropriate to sell the property and to apportion of the sale proceeds equally among the four sharers. Opposing the suggestion made by the Advocate Commissioner, the plaintiff filed her



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

objections. In the objection, among other things, it was stated by the plaintiff that the suit property is feasible of division and that, the report of the Advocate Commissioner is contrary to the physical features of the property in question. It was also stated that sale of the property and distributing the proceeds of sale to the plaintiff and the defendants 1 to 3 will not be beneficial to any one. That apart, the plaintiff also questioned the rationale of the valuation of the property by the advocate Commissioner at Rs.8,81,00,000/-.

24. In view of the objection of the plaintiff, the learned Judge thought it fit to appoint another Advocate Commissioner. Accordingly, a second Advocate Commissioner was appointed by an order dated 19.04.2021. The second advocate commissioner also inspected the property and submitted his report on 29.07.2021. The report of the second advocate commissioner was accompanied by a plan estimated by a qualified Valuer. As per the estimate provided by the Valuer, the property can be divided into four, provided it will result in wastage of 36% of the value of the property, while dividing it. Therefore, based on the opinion of the qualified Valuer, it was reported by the Advocate Commissioner that division of the property into four equal shares is not feasible and it will be beneficial only if the property is brought



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

to auction sale and the proceeds of the sale is divided equally among the sharers. However, the second Advocate Commissioner assessed the value of the plaint described property at Rs.11,54,00,000/-. Even for the report of the second Advocate Commissioner, the plaintiff submitted her objection contending that the property is feasible of division into four shares and the opinion that 36% of the property has to be forgone in the event of division is factually incorrect. The plaintiff also questioned the rationale behind the assessment of the value of the property at Rs.11,54,00,000/- and stated that the value arrived at is imaginary.

25. In these factual background, the learned Judge concluded that the two successive advocate commissioners appointed by the Court have opined that the suit property is not feasible of division or if it is divided, it will result in giving up 36% of the value of prime property situated in an important locality and it cannot be simply brushed aside. The learned Judge also held that when two advocate commissioners appointed by this Court have rendered identical opinion as regards the feasibility of the division of the property, the objection of the plaintiff cannot be accepted. The learned Judge also concluded that the plaintiff is unduly delaying the passing of the final decree much to the chagrin of the defendants and the final decree proceedings



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

cannot be delayed any further at the instance of the plaintiff. Resultantly, the learned Judge appointed an Advocate Commissioner for sale of the plaint described property by auction subject to certain conditions so as to divide the proceeds of the sale of the suit properties equally to the plaintiff as well as defendants.

26. Even though the learned counsel for the plaintiff would contend that the haste with which the learned Judge proceeded to appoint an Advocate Commissioner to sell the plaint mentioned property without providing adequate time for the parties to explore the other viable options, is required to be interfered with, we have noticed that at the instance of the plaintiff, successive advocate commissioners have been appointed by the learned Judge. The Advocate Commissioners so appointed are neutral persons, who, after issuing notice to the plaintiff as well as defendants, inspected the property in their presence. The second Advocate Commissioner has even taken the assistance of a qualified Valuer, who reiterated that in the event of division of the plaint described property into four shares, substantial land value to the extent of 36% has to be foregone. When such a report has been given after physical inspection by the second Advocate Commissioner, by annexing a plan drawn by the qualified Valuer, there is no good reason to



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

ignore it. When the experts in the field have come up with a suggestion based on their expertise, the Court has to accept it if it is otherwise workable and reasonable. It is needless to mention that the report of the second Advocate Commissioner is akin to the one submitted by the first Advocate Commissioner. Both the Advocate Commissioners, in tandem, have stated that the plaint described property, if divided, will not be beneficial to all the stakeholders. On the other hand, if it is sold in public auction, it would fetch a reasonable amount.

27. We have also noticed that the plaintiff was given adequate opportunity to submit her objection to the reports of the Advocate Commissioner. In the objections submitted by her, she has merely reiterated that the plaint described property is feasible of division, without any basis. Such an opposition of the plaintiff is not only bereft of any material suggestion, but it is contrary to the plan drawn by the qualified Valuer. No materials are produced to either disprove or contradict the report of the Advocate Commissioner and the qualified valuer. Hence, the report of the Second Advocate Commissioner cannot be assailed. In this context, it will be useful to refer to Section 2 of the Partition Act, 1893.

“2.Power of court to order sale instead of division in partition suits.



WEB COPY

“Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.”

From the above provision, it is clear that the court before ordering the sale of the property, must ensure that the division of the property cannot be reasonably or conveniently made and distribution of sale proceeds would be more beneficial to the shareholders, then, the court can direct sale at the instance of one shareholder or all the shareholders. The court should also consider the nature of the property and the number of shareholders before taking a decision. The word “reasonably” would indicate that the reason to not divide the property must be rational and acceptable by a man of ordinary prudence. That apart, the word “conveniently” employed in the section would mean the collective convenience of all the shareholders if they are in unison or in absentia, the convenience of the majority of the shareholders. We have already held that from the report of the Advocate Commissioner and the valuer, it is evident that the division of the property is not beneficial to all of them and the reasons for the same are also acceptable. Therefore, we are of



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

the view that the learned Judge, in the given circumstances, is wholly justified in concluding that the plaint described property is not feasible for any division and it will be beneficial only if the property is sold in public auction.

28. One more aspect to which our attention was drawn is that during the pendency of the present appeals, a sum of Rs.60,00,000/- was deposited by the defendants to show their *bona fide* to purchase the property, in the event of it being brought to public auction. Even though the plaintiff has expressed her willingness to purchase another 1/4th share out of remaining 3/4th share, she has not taken any steps to prove that she is resourceful enough to purchase the same. According to the defendants, the plaintiff, in the guise of purchasing one share in the suit property from one of the defendants, is only prolonging the settlement of the issues. At this juncture it is relevant to refer to Sections 3 and 4 of the Partition Act, 1893, which read as under:

“Section 3. Procedure when sharer undertakes to buy.

(1) If, in any case in which the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.



(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Section 4. Partition suit by transferee of share in dwelling-house.

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

The above two sections portray two situations for sale of property among the shareholders. Section 3 speaks about a situation when the sharers are family members and Section 4 speaks about a situation when a share is with a third party. However, the intention in both the sections remain the same. Further, upon consideration of Section 3, it does not make out a scheme for a person willing to purchase the property to buy only one share or another portion alone, when the property is not divisible. For this purpose, the provisions of Section 3 will also have to be read along with Section 2, as it contemplates a



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

decision to be taken for not dividing the property, followed by sale. As the entire property is to be brought for auction, the use of the word “share” or “shares” in Section 3 must be understood in the context of number of shareholders who want the property to sold when the property is held to be indivisible under section 2 and not construed to be an option for the person willing to purchase one share. Further, when more than one person has requested for sale of the property, the person who wants to retain the possession by purchasing the shares of others is left with no option but to purchase all the other shares. Otherwise, the very objection of Section 2 would be defeated. The above view is further fortified by sub-section (2) of Section 3, which deals with the circumstances when each shareholder individually proposes to purchase the property. Under such circumstances, the property would be sold to a value above the value fixed by the court. It will be useful to refer to the Judgment of the Apex Court in ***R. Ramamurthi Iyer v. Raja V. Rajeswara Rao [(1972) 2 SCC 721]***, in which, it was held as follows:

“8. The Partition Act was enacted to amend the law relating to partition. Sections 2 and 3 are as follows:

2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of



WEB COPY



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders, severally apply for leave to buy as provided in sub-section (1) the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications."

The scheme of Sections 2 and 3 apparently is that if the nature of the property is such or the number of shareholders is so many or if there is any other special circumstance and a division of the property cannot reasonably or conveniently be made the court can in its discretion, on the request of any of the shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribute the proceeds among the shareholders. Now where a court has been requested under Section 2 to direct a sale any other shareholder can apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In such a situation it has been made obligatory that the court shall order a valuation of the share or shares and offer to sell the same to the shareholder who has applied for leave to buy the share at a price ascertained by the court. In other words if a plaintiff in a suit for partition has invoked the power of the court to order sale instead of division in a partition suit under Section 2 and the other shareholder undertakes to buy at a valuation the share of the party asking for sale the court has no option or choice or discretion left to it and it is bound to order a valuation of the share in question and offer to sell the same to the shareholder undertaking or



WEB COPY

applying to buy it at a valuation. The purpose underlying the section undoubtedly appears to be to prevent the property falling into the hands of third parties if that can be done in a reasonable manner. It would appear from the Objects and Reasons for the enactment of the Partition Act that as the law stood the court was bound to give a share to each of the parties and could not direct a sale or division of the proceeds. There could be instances where there were insuperable practical difficulties in the way of making an equal division and the court was either powerless to give effect to its decree or was driven to all kinds of shifts and expedients in order to do so. The court was, therefore, given a discretionary authority to direct a sale where a partition could not reasonably be made and the sale would, in the opinion of the court, be more beneficial to the parties. But having regard to the strong attachment of the people in this country to their landed possessions the consent of the parties interested at least to the extent of a moiety in the property was made a condition precedent to the exercise by the Court of the new power. At the same time in order to prevent any oppressive exercise of this privilege those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the court."

The Judgment in ***Rani Aloka's case*** relied upon by the Learned Counsel for the appellant will not come to the aid of the appellant as in the present case, there is already a valuation report that has been accepted by this court in the absence of any other contradictory material or valid reasons to prove that the valuation is wrong. We have already seen that the defendants 1 to 3 have deposited Rs 60,00,000/- to participate in the auction. However, the plaintiff has not been in a position to do so and has been dragging the matter. If the plaintiff intends to purchase the property, she must buy all the shares as the division of the property is not feasible in the interest of all the parties. We may come across some cases, where, even when the property is only partially divisible, the shareholders may opt for sale of the indivisible property and



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

retention of divided property, which is not the case here. In view of the above reasons, the contention of the plaintiff to buy 1/4th share in the property, in addition to her 1/4th share, is rejected.

29. In view of the foregoing reasonings, we are of the view that the order passed by the learned Judge, appointing an Advocate Commissioner to sell the plaint described property in public auction, is perfectly in order and it need not be interfered with.

30. Accordingly, all the Original Side Appeals fail and they are dismissed. No costs. It is open to the appellant / plaintiff to participate in the auction of the suit property. Connected CMPs are closed.

(R.M.D., J.) (M.S.Q., J.)

07.06.2023

Index : Yes/No
Neutral Citation : Yes/No
Speaking/Non-Speaking Order
rsh



WEB COPY



Original Side Appeal Nos. 20, 21, 22, 23 and 24 of 2022

R. MAHADEVAN, J

and

MOHAMMED SHAFFIQ, J

rsh

OSA Nos. 20 to 24 of 2022

07.06.2023