

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24.02.2014
Pronounced on: 08.08.2014

+ **CM(M) 204/2014 & CM Nos.3699-700/2014**

M/S H DOHIL CONSTRUCTIONS CO (P) LTD Petitioner

Through: Mr. Rajesh Manchanda with
Mr. Rajat Manchanda, Advs.

versus

ROHIT LAL & ORS Respondents

Through: Mr. Surinder Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. This petition impugns an order dated 06.11.2013 of the Additional District Judge (ADJ) which appointed a Local Commissioner for recording of evidence in the Court room between 4 and 6 pm on six consecutive dates. The order was passed in the presence of counsel and an amount of Rs.2,500/- was directed to be paid to the Local Commissioner (including stationery and typing charges) for each sitting and Rs.400/- as diet money to the Reader who would sit in Court after court hours to assist in the proceedings. While dismissing the petitioner's application under Order 18 Rule 5 read with Section 151 CPC, the subsequent order dated 07.02.2014 confirms the previous one. By the said application, the petitioner had pleaded that (i) the appointment of the Local Commissioner was *suo moto* by the Court and was not sought by either of the parties; (ii) it expressed their concern and desire that the evidence of the witnesses be recorded in the Court in the presence of the learned Judge under

Order 18 Rule 5 of the Code of Civil Procedure; (iii) that the defendants too had so desired by expressing their ‘no objection’ to the aforesaid application; (iv) that appointment of Local Commissioner could be done only under Order 26 when the occasion and justification for it arises and, finally (v) that the additional costs towards Local Commissioner’s fees and diet money was unwarranted. Therefore, the petitioner argued, the order of appointment of Local Commissioner ought to be set aside.

2. The learned ADJ having considered the application reasoned that: (i) that the suit was pending since 2007 and despite the passage of nearly six years, recording of evidence had not even begun, (ii) therefore, it would be in the fitness of things and would lend expedience to the disposal of the suit if the evidence was recorded by the Local Commissioner; (iii) that the order appointing the Local Commissioner clearly and specifically mentioned as to how the evidence would be recorded and that in case of any discrepancy both the parties could specifically point out to the Court so that subsequent remedial measures could be taken so as to ensure fair recording of the evidence by the Local Commissioner; (iv) the legislature has stipulated the statutory provision to facilitate expeditious trial of cases; (v) the only objection to the appointment of the Local Commissioner that counsel could have was that they would have to be in the court room till 6 o’clock, which was a trivial objection; (vi) it was incumbent upon lawyers in their professional duty, to keep in mind the welfare of the litigants and they ought to be primarily concerned with

the early and timely disposal of pending litigation; (vii) it would be in the interest of the parties to have the evidence recorded on five dates consecutively which otherwise in court could take years to complete, often because of adjournments sought by counsel, which in turn lead to un-warranted delays in the disposal of the cases, (viii) thus adding to the burden of pendency of cases in the courts; and (ix) the recording would be done in the court room itself during the period when the Presiding Officer would be busy dictating judgments in the chamber and the clerical staff would be available in the Court, thus there would be optimum utilization of the infrastructure and (x) this endeavour should be welcomed by the Bar in the interest of their clients as well as in the quick disposal of the cases.

3. The Learned counsel for the petitioner relies upon the ratio in ***T. Srinivasa Rao v. T. Venkata Rangaiah*** AIR 2007 AP 1 to contend that the appointment of Local Commissioner should not be resorted to almost as a matter of course. The judgment held inter alia, that:

“6. Time and again this Court cautioned the trial Courts, not to appoint Commissioners for recording cross-examination of witness, as a matter of course. The effect of permitting the witnesses to file affidavits in lieu of chief-examination, resulting in denial of opportunity of the Courts, to appreciate and assess the demeanour of witnesses; was pointed. In fact, amendment of Order 18 Rule 4 C.P.C., to the effect that the only mode of chief-examination shall be through filing of affidavits, had its own implications, on the adjudication of the suit, notwithstanding the time it had saved, for the Courts in the process. Be that as it may, the Parliament did

not intend appointment of Commissioners for recording of cross-examination, as a matter of course. The question as to whether recourse should be had to, such a measure; would depend upon the pressure of work in the Court, the condition of witness, i.e. the difficulty for him to appear before the Court, the nature of questions that may crop up during cross-examination, such as, the occasion to overrule to sustain any objections, determination as to the admissibility and relevancy of documents, etc.”

“7.Appointment of Commissioners to record the cross-examination of an otherwise able witness, is prone to weaken the very adjudicatory process, and it would naturally tell upon the quality of adjudication. The tendency, which would encourage the Courts, to avoid one after the other facets of adjudication, is likely to increase. The logical extension of such a course would be, to search for devises, excuses, or shortcuts, for disposal of the suits, without actually examining the issues, appreciating the evidence or undertaking discussion. Each and every step in the adjudicatory process has its own impact on the ultimate outcome. It must not be forgotten that adjudication by Courts is respected, on account of various stages involved in it, and with the deletion of one or more of such steps, the credibility of the entire system would receive a dent.”

4. This Court is conscious that during cross examination and re-examination, the demeanour of the witness is required to be appreciated and assessed. While the recording of evidence (cross-examination and re-examination) of the witness in attendance whose evidence (examination-in-chief) by affidavit has been furnished to the Court, is permissible by a Local Commissioner, the Court would not

as a matter of routine deny itself the essential aspect of appreciation and assessment of the demeanour of the witnesses during such examination. It would weaken the adjudicatory process. The essential processes and moments which contribute to the formation of adjudicatory opinion cannot always be delegated to a Local Commissioner. A mere ministerial recording of evidence could well be the objective for permitting recording of evidence through Local Commissioner, provided such appointment is occasioned and warranted in the select circumstances contemplated in the statute. However, the Courts would be cautious in delegating such essential aspects of the trial to a Local Commissioner which extends to the formation of a view, opinion, expression or appreciation of evidence or the demeanour of witness which would form the very basis of the adjudication. The Courts would justifiably and robustly retain such aspects of the trial exclusively for themselves, so that recording of evidence by Local Commissioners is not resorted to as a matter of routine.

5. This Court is of the view that where both the parties wanted the evidence to be recorded in the presence of the learned Judge in the court, and furthermore, there was an objection to the imposition of financial burden on the parties, the Trial Court ought to have reviewed and indeed recalled its order of appointment of the Local Commissioner. Where parties object to the imposition of a financial burden on the appointment of a Local Commissioner, albeit for the purpose of lending expedition to the disposal of a pending litigation,

the Court ought to be cautious in casting such financial burden on them. Faith in the judicial adjudicatory process is affirmed and enhanced when litigants observe the conclusion of proceedings in the Court and return with impression that a fair and equitable procedure as known to law, had been adopted. There can be no better “fair process” than the proceedings conducted in the open Court. It cannot be read as the objective of the legislation to impose costs on unwilling or economically incapable parties for the appointment of Local Commissioners, howsoever small or large that cost may be, if the parties so object. The legal process would not condone a methodology which tends to weaken either the representation or the case of a party before a court of law because of comparative financial weakness. Imposition of a monetary burden can be cast upon a person only by sanction of law and not by the Trial Court where the litigants raise an objection to the alternative procedure adopted. Although, the Trial Court’s concern apropos pendency of cases and the reasoning for expeditious disposal of the case cannot be faulted and the disposition of counsel, in certain circumstances, may well be deemed obstructive, but the order itself resulting in the appointment of the Local Commissioner and the cost imposed would be unjustified when there is opposition to such appointment or is otherwise deemed unwarranted. Any procedure adopted by the lower courts which tends to weaken the faith of the public in the judicial adjudicatory mechanism as per legally defined procedure, would be susceptible to the High Courts’ intervention in its supervisory and revisionary jurisdiction.

6. For the aforestated reasons, this Court is of the view that the impugned order suffers from material irregularity. It ought to be and is accordingly set aside.

7. The petition is allowed.

**NAJMI WAZIRI
(JUDGE)**

AUGUST 08, 2014/acm