

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.5078 OF 2016

ORDER:

The Civil Revision Petition is filed against the order dated 02.09.2016 passed in I.A. No.308 of 2016 in O.S. No.408 of 1998 on the file of Additional Judge cum VI Senior Civil Judge, City Small Causes Court, Hyderabad.

2) The revision petitioner is the defendant No.9 to the O.S. No.408 of 1998, which is filed by the respondent Nos.1 to 3 herein for the relief of declaration to declare that defendant No.1's sanction permit bearing No.475/88 dated 28.07.1997 granted to defendants 2 to 6 for carrying on the construction in respect of suit plot bearing H.No.21-2-141 to 142 admeasuring 891 Sq.yds equivalent to 745 Sq.mtrs within the four boundaries, of Charkaman, Hyderabad as illegal, null and void, consequential relief of prohibitory injunction against defendants 2 to 6 (respondents 5 to 9 herein) from carrying on the constructions in the above property, mandatory injunction against 1st defendant to demolish the structures which are already raised by defendants 2 to 6 and in case they disobey to remove the constructions be make it open to sky as open space on all four sides of suit schedule property for the purpose of public passage.

3) In the suit, an advocate commissioner was appointed on the application of defendant Nos.1, 7 and 8 way back in the year 2006 in I.A. No.186 of 2006. Opposing said appointment order dated 28.03.2006, the defendants 2 to 6 filed the review application in I.A. No.649 of 2006 and the review was allowed in part vide order dated 28.04.2006. The 9th defendant claims to

have undertaken a development agreement with defendants 2 to 6 and filed an application in I.A. No.308 of 2016 on 28.04.2016 to appoint an advocate commissioner to take measurements of the public road lying to the western side of the suit property. His supporting affidavit in another petition I.A. No.84 of 2016 speaks that he sought permission of the Court to serve interrogatories upon the plaintiffs and also filed sketch along with that petition and it is the case of plaintiffs that to reach Charminar people of the locality have to pass through a very narrow passage, which is to the southern side of the suit property.

4) According to the 9th defendant, instead of a direct answer, the plaintiffs submitted evasive replies for which action is allegedly required to be taken by invoking Section 195 of the Criminal Procedure Code, 1973 (Cr.P.C). Leave it, as it is, the further submission from the affidavit averments was that, commissioner was appointed in the year 2006 and he submitted report with measurements of passage lying on the southern side of the suit property viz.,

- A) Width of lane is 5'-6".
- B) The length of the lane is 14.3 meters.
- C) Nature of use, the public are using it as passage.

So far as the public passage on western side is concerned, the advocate commissioner's report is incomplete, he did not exactly measure the width of the public passage lying on the western side of the suit property. Therefore the narrow passage on the southern side is not the only access to the residents of the locality to reach Charminar and there is no need to use the narrow

passage, when 20 feet road is available lying on the western side of the suit property. Hence, requests to re-entrust the warrant to inspect the property and to take measurements of public road.

5) The said application was opposed by the plaintiffs in their counter affidavit while denying the averments stating that as per the original order culminated in review order of 2006, earlier a commissioner was appointed in I.A. No.649 of 2006 as he could not execute the warrant, other commissioners by name Sri R.Veerender Kumar and Sri K.Pradeep Kumar were appointed to do with the job of commission. They also did not complete the work entrusted to them and returned the warrant. Therefore, fourth person by name Sri Mohd. Manzoor Ahmed Sahreef was appointed and said Commissioner completed the work and filed his report on 09.11.2013, along with a map showing the length and width of passage on western side and at the time of execution, 3rd defendant was present and signed in the proceedings of the advocate commissioner and defendant Nos.2 to 6 have not filed any objections to said report. The defendant No.5 in his counter to I.A. No.634 of 2007 stated that the Commissioner executed the warrant and completed the work, thereby the petition vide I.A. No.634 of 2007 to appoint the commissioner was to be dismissed but orders were passed on 24.10.2008 by appointing one Sri Veerender Kumar Jaiswal as advocate commissioner to measure the road and complete the execution warrant and that became final and once the report of Mohd. Manzoor Ahmed Shareef dated 09.11.2013 is not expunged the new commissioner cannot be appointed and there are no valid reasons assigned for appointment of new commissioner. The Court cannot appoint a Second

Commissioner for the same purpose. The width of western side of passage is given as 20 feet and even otherwise, the western side road vests in Municipal Corporation of Hyderabad and the records pertaining to the width of western side road can be summoned from GHMC and what the 9th defendant entered into development agreement for development of existing structures and construction is already completed and the petition is nothing but delay tactics pursuant to the said counter dated 09.06.2016 and after hearing the impugned order dated 02.09.2016 passed by the lower Court dismissing the petition saying the suit is of the year 1998 questioning the so-called constructions under the alleged sanction plan by defendants 2 to 6 to declare as illegal, null and void with consequential permanent prohibitory and mandatory injunctions that was in a representative capacity and the same ripe for arguments and the constructions made is to the premises No.21-2-141 and 142 of an extent of 891 Sq.yds of Charkaman showing joint passage of 10'-0" on the east, 20" wide road on the west, joint passage 13'-6" on the north and public passage 3'-6" on the south.

6) The 1st defendant is the Municipal Corporation. The suit claim is mainly on defendants 2 to 6. The 9th defendant claiming 50% share pursuant to the development agreement in claiming through defendants 2 to 6, thereby the petition for appointment of advocate commissioner to measure the western side road of 20' width which connects to main road, requires no need to allow and beyond the scope of law, that too, commissioner was appointed long back and also submitted report mentioning the lane on the southern side, thereby the present petition for appointment of another commissioner cannot be entertained.

7) Impugning the same, the present revision is filed.

8) Heard learned counsel for the revision petitioner vis-à-vis learned counsel for respondents at length. Perused the material on record.

9) Order XXVI Rule 9 C.P.C speaks the purpose of local investigation where the Court deems necessary and requisite or proper for the purpose of elucidating any matter in dispute where the Commissioner can be appointed. Once the commissioner is appointed and executed the warrant duly after notice as contemplated by Rule 18 subject to objections, if any, the commissioner's report with enclosures like a plan form part of the Court record and same can be read without even any examination of the Commissioner as part of record of the Court.

10) Here, originally commissioner was appointed in I.A. No.186 of 2006. Review petition was filed in I.A. No.649 of 2006 that was even allowed in part at the instance of defendants 2 to 6 and the subsequent Commissioners returned the warrant without execution and ultimately 4th person executed the commission and submitted report on 09.11.2013. Undisputedly, there are no objections to the same from defendants 2 to 6. No doubt, the 9th defendant in claiming development agreement with 50% share from them impleaded only in the year 2015 and filed the present petition to appoint another commissioner.

11) Once the commissioner was appointed and submitted report appointment of another commissioner cannot be entertained, unless the earlier commissioner report's is set-aside or scrapped. Here it is not the case. Needless to repeat the facts

further, the prayer is not even for any re-entrustment for the Court to consider the purpose of elucidating any matter further of the case in issue. Once such is the case, for this Court while sitting in revision, there is nothing to interfere but for to say, leave about any serving of interrogatories and giving or not of answers no way given the scope of appointment of second commissioner during subsistence of 1st report, the only remedy, if at all, is after submission of arguments make a request for any re-entrustment, if necessary, for the trial Court after hearing the arguments at length, if at all, to consider therefrom, within the limited scope for the purpose of elucidating the matter in dispute.

12) Accordingly and in the result, the revision is disposed of, by upholding the order of the lower Court. However, the revision petitioner is at liberty to the limited extent supra to make a request to the Court while submitting arguments for any necessity to re-entrust the warrant to same commissioner, who executed the warrant. No order as to costs.

13) Consequently, pending miscellaneous petitions, if any, shall stand dismissed.

Dr.JUSTICE B. SIVA SANKARA RAO

Dt.07.11.2016
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