

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.1875 OF 2017

ORDER:

This petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.17 of 2017 in I.A.No.977 of 2016 in O.S.No.316 of 2014 dated 27.03.2017 passed by the V Senior Civil Judge, City Civil Court, Hyderabad, directing the Advocate Commissioner to conduct survey, measure the entire land as mentioned in the warrant by identifying and fixing the boundaries as per the warrant of commission with police aid from the concerned police authorities.

For the sake of convenience, the parties will be referred as arrayed in I.A.No.977 of 2016 in O.S.No.316 of 2014.

I.A.No.977 of 2016 was filed by the respondents herein/petitioners before the V Senior Civil Judge, City Civil Court, Hyderabad for appointment of an Advocate Commissioner to survey and identify by fixing the boundaries of the house constructed over 244 sq.yds and appurtenant open land of 300 sq.yds situated at Domalguda, Hyderabad and the Senior Civil Judge's Court ordered the petition on 13.12.2016 by appointing an Advocate Commissioner. Later, the Advocate Commissioner filed his report stating that the schedule land mentioned in warrant as 300 sq.yds of open land was not measured as the respondents did not allow to measure the same, stating that the said open land belongs to the premises bearing No.1-2-64. Further, it is stated in the report that, when the Advocate Commissioner asked the

surveyor to measure the open land on the northern side of the property, the respondents objected saying the property sold to the petitioners is only 300 sq.yds.

But, the petitioners herein/respondents filed their objections allegedly before the Trial Court, whereas, I.A.no.217 of 2017 is filed under Section 151 C.P.C, requesting the Court to direct the Commissioner to take police protection for completion of the work entrusted in terms of the warrant issued in the above case by measuring and fixing the boundaries after removing the obstructions such as trees and debris of the dilapidated house, at the cost of the respondents herein/petitioners.

The allegations made in the affidavit are clear that the Advocate Commissioner was not allowed to execute the warrant by the petitioners herein or their henchmen. The other allegations are not germane for deciding the present issue.

The petitioners herein resisted the petition by filing a counter, contending that the Advocate Commissioner completed execution of warrant and filed report and the petitioners filed objections on the report, but, whereas, the respondents did not file any objections. In such case, Commissioner cannot be redirected to execute the warrant with police aid.

The Trial Court upon consideration of the material on record, issued directions in I.A.No.977 of 2016 in O.S.No.316 of 2014 on 13.12.2016, which runs as follows:

“18. In the result, this petition is allowed as prayed for, appointing Sri Y.S. Sastry, Advocate as Advocate

Commissioner to survey and identify by fixing boundaries of the house constructed over 244 sq.yard and appurtenant open land of 300 sq.yards situated at Domalguda, Hyderabad (pertaining to suit schedule property) after exclusion of the Nala land and slab thereon constructed by the petitioner, having boundaries: North: Premises No.1-2-64, South: Nala and House of Mr. Ranganath, East: P & T Hostel, West: 30'wide road. The Advocate Commissioner, before commencing his work with the help of the surveyor, shall give advance notice to all the parties in this petition in writing and may receive work memos, if any, and shall execute the commission preparing the report with sketch maps in clear terms. His fee is fixed at Rs.3000/- tentatively to be paid by the petitioners/plaintiffs. For filing report, call on 29.12.2016.”

Undisputedly, the Commissioner filed his report, taking measurement of the property. At the end of the first page of his report, the Commissioner made the following observation:

“The warrant mentioned 300 sq.yds of open land is not measured as the respondents did not allow to measure the same saying that the said open land belongs to the premises bearing No.1-2-64.

Similarly, the first paragraph in page no.2 of the Commissioner’s report, reads as follows:

“.....when the Advocate Commissioner asked the surveyor to measure the open land on the northern side of the property, the respondents objected saying the property sold to the petitioners is only 300 sq.yds.....”

Further, at the end of the report, the Commissioner specifically stated that, as the surveyor who measured the property drew the sketch plan has prepared not filed the fair map of the property, he has taken the fair copy of the map got prepared from another surveyor and also stated that, as per the measurements taken, the total area excluding the passage on the south is

admeasuring 301 sq.yds. With the above observation and inspection of the property, the Commissioner filed his report without measuring the open area.

Though, Commissioner expressed his inability to take measurements, in view of the alleged objections raised by the respondents, he returned the warrant of Commission along with notices and other proceedings. Thus, the Commissioner returned the warrant filing his report. Therefore, the course open to the Court is to appoint an another Advocate Commissioner or re-direct the same Advocate Commissioner for identification and fixing boundaries over the property, after considering the objections, if any, filed by both the parties.

The petitioners have filed objections on the Advocate Commissioner's report, but the respondents did not file any objections and the objections filed by the petitioners are pending for consideration before the Trial Court. unless the report filed by the Advocate Commissioner was expunged from the record after considering the objections no direction to re-execute the warrant cannot be issued. But, strangely, the present order is passed on the application filed by the respondents before the Trial Court, directing the Advocate Commissioner to execute the warrant with police aid. The present order under challenge is passed on the application filed by the respondents before the Trial Court directing the Advocate Commissioner to re-execute the warrant with police aid. This is nothing but disowning the responsibility of the Court to decide the objections on the Advocate Commissioner's report.

Unless, the report filed by the Advocate Commissioner is expunged, no direction for re-execution can be issued, either with or without police aid and during pendency of the objections on the Advocate Commissioner's report for consideration, the direction issued by the Trial Court is erroneous.

In **Durgam Mangamma v. P. Mohan and another**¹, this Court considered the power of the Court to appoint Second Commissioner under Order XXVI Rule 9 C.P.C, where this Court held in paragraph 9 as follows:

“Admittedly no second Commissioner can be appointed for the same purpose unless and until the report of the Commissioner is expunged. By virtue of the impugned orders in I.A. No. 642 of 1988 the first Commissioner's report is sought to be expunged which occasions not only in failure of justice but will also result in irreparable injury to the plaintiff. I find substance in the said submission and by virtue of the appointment of the second Commissioner it not only results in failure of justice but will cause irreparable injury to the plaintiff and consequently even according to the observations made in the above three decisions this is a fit case where Section 115 of the Code of Civil Procedure can be invoked.”

But here, the case is different and I.A.no.217 of 2017 is not a petition filed for appointment of second commissioner, but, the petition is filed to re-direct the Commissioner to execute the warrant strictly adhering to the directions issued by the Court in the warrant of Commissioner, with police aid, because the Advocate Commissioner's complained that he was not allowed by the petitioners herein/respondents to measure certain piece of lands.

¹ 1991 (1) A.L.T. 269

But, for the reasons best known to the petitioners herein/respondents, they did not file any objections on the Commissioner's report. In such case, filing an application for redirection to the Commissioner would not arise. Hence, the order passed by the Trial Court during pendency of the Commissioner's report and objections filed thereon for consideration, redirecting the Commissioner to execute the warrant again with police aid is an illegality. Therefore, the order passed by the Trial Court is hereby set-aside while permitting the respondents herein to file objections on the Commissioner's report within 15 days from today and on filing such objections, if any, by the respondents herein, the Trial Court is directed to consider the objections and pass appropriate orders, after hearing both the counsel.

With the above direction, the civil revision petition is disposed of, setting aside the order in I.A.No.17 of 2017 in I.A.No.977 of 2016 in O.S.No.316 of 2014 dated 27.03.2017 passed by the V Senior Civil Judge, City Civil Court, Hyderabad.

Consequently, miscellaneous applications pending if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:21.06.2017

SP