

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

C.R.P. No.5540 of 2017

ORDER:

The revision petitioner/defendant seeks appointment of second Commissioner on the main ground that the first Commissioner appointed on his request and filed report had unfortunately expired and thereby the petitioner lost right of cross-examination of the said Commissioner, which would adversely effect his case. The Trial Court dismissed the petition on the observation that while filing the objections to the report of the Advocate Commissioner, the petitioner did not reserve the right of cross-examination and thereby the report became part of the evidence in terms of Order XXVI Rule 10 CPC and therefore, the petitioner now cannot seek for appointment of a second Commissioner in the light of first report already forming part of the record.

- 2) Heard both sides.
- 3) At the outset, I find no impropriety or illegality in the order impugned. As per Order 26 Rule 10(2) CPC, the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. The above proviso would explain us that it is open for the parties to examine the Commissioner on

the matters referred to him in his report or in the manner in which he had conducted the investigation. Once the party seeks to examine the Commissioner to elicit answers on the aspects touching his execution of the Commission warrant, the Court has no option but to examine the Commissioner. Unless that exercise is completed, the Commissioner's report will not form part of the record. On this proposition of law, we can refer to the decision reported in ***Smt. Vadda Rajeswaramma vs. Dr.V.L.Narasimha Charyulu and others***¹, wherein it was observed thus:

“According to Sub-rule (2) to Rule 10 of Order XXVI, the report of the Commissioner and the evidence taken by him during the inspection shall be evidence in the suit and shall form part of the record. Therefore, there is no controversy with regard to admissibility of the report as evidence during the trial and making the report of the Commissioner part of record. However, before the report is made part of the record and taken as piece of evidence, it is open for the Court to examine the Commissioner on matters referred to him in his report or as to the manner in which he had made the investigation. It is open for the parties also to examine the Commissioner or matters referred to him in his report or on the manner in which he had conducted the investigation. This is the only interpretation which can be placed upon Sub-rule (2) of Rule 10. There is no other interpretation possible of this sub-rule. It is a different matter if neither the Court nor any of the parties takes any objection to the report. In such a situation the report becomes final and becomes part of the record and also can be taken as piece of evidence. But, once a party objects to it had specifically wants that the Commissioner be examined, the Court has no option but to examine the Commissioner. Unless that is done, the Commissioner's report can neither form part of the record nor it can become a piece

¹ AIR 1998 AP 202

of evidence which could be relied upon at the stage of disposal of the suit.”

Then the question is when once the party did not ask for examining the Commissioner and the report became part of the evidence, whether he, at a later stage of the suit can request the Court for permission to examine the Advocate Commissioner or seek for appointment of a second Commissioner since the first Commissioner is no more available for whatever reason, as in the instant case. In the above decision, it was observed that if neither the Court nor any of the parties takes any objection, the report becomes final and part of the record and also can be taken as a piece of evidence. It would thus mean, the party cannot seek examination of the Commissioner after the report became final and part of the record. In the instant case, it appears such a situation had already arisen as can be seen from the impugned order.

4) Hence, I find no merits in the revision petition and the same is accordingly, dismissed. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 28.11.2017

scs