

- Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.9376 OF 2018

Sarla Hira Advani	]	Petitioner
Vs.		
G.L. Hotels Ltd.	]	
also known as "Graviss Hospitality Ltd."	]	
and another.	]	Respondent

.....

Mr. A.S. Uraizee, for Petitioner.
 Mr. Rahul Moghe, for Respondent No.2.

....

CORAM : R.G. KETKAR, J.

DATE : 26th SEPTEMBER, 2018.

P.C:

Heard Mr. Uraizee, learned Counsel for the petitioner and Mr. Moghe, learned Counsel for respondent No.2 at length.

2. Mr. Uraizee submits that respondent No.2 is only contesting respondent. He, therefore, seeks leave to delete respondent No.1 from this Petition. On the oral application made by Mr. Uraizee, leave to delete respondent No.1 is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as "plaintiff" has challenged the order dated 25th July, 2018 passed by the learned Judge, Court Room No.7 of the Court of Small Causes at Mumbai below Exhibit-78 in R.A.E. Suit No.442/904 of 1998. By that order, the learned trial Judge rejected the application taken out by the plaintiff for exhibiting the entire Commissioner's report dated 19th December, 2007 at Article-X-2. While rejecting the application, the learned trial Judge has observed thus;

“2.However, the letter of the Court Commissioner dated 19/12/2007 be marked as Exhibit-81 and Report of the Court Commissioner shall be treated as part and parcel of that letter, subject to objection to be decided with the suit”.

4. Rule. Mr. Moghe waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. In support of this Petition, Mr. Uraizee has invited my attention to the evidence of P.W.2 Mr. Riyaz Ahmed Abdul Rehman Khan. He submitted that on the basis of the evidence of P.W.2, the learned trial Judge ought to have marked Commissioner's report dated 19th December, 2007 as 'Exhibit' instead of marking it as 'Article-X-2'. He further invited my attention to clause-2 of the operative part of the order by which the learned trial Judge has marked letter of the Commissioner dated 19th December, 2007 as Exhibit-81 and report of the Commissioner is treated as part and parcel of that letter, subject to objection to be decided with the suit. He submitted that in view of the evidence of P.W.2, the learned trial Judge ought to have marked Commissioner's report separately. He, therefore, submitted that the Commissioner's report dated 19th December, 2007 may be marked as “Exhibit”, thereby allowing application Exhibit 78 in terms of prayer clause (a) of the application.

6. On the other hand, Mr. Moghe supported the impugned order. He relied on Order-XIII, Rule-6 and 7 of C.P.C as also Clause 525 of Chapter XXVII of the Civil Manual. He also relied on the decision of **Vij Kamagar Sahakari Patsanstha Limited Vs. Ramkrushna Dhondiram Thorat and others, (2009) 3 ALL MR 389** and in particular paragraph 10 thereof. He

submitted that in view of clause 525 of Chapter XXVII of the Civil Manual, the practice is followed in the Small Causes Court not to mark the documents which are formal documents. In any case, as the Commissioner's report is not proved by examining author of the report, it cannot be marked as Exhibit.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that Commissioner Dr. Roshan H. Namavatii had submitted report dated 19th December, 2007. A perusal of evidence of P.W.2 shows that Commissioner Dr. Roshan H. Namavati died two years back i.e sometime in the year 2016. In the affidavit of examination-in-chief, P.W.2 deposed thus;

“My qualification is Architectural Draftman Civil Engineer. The nature of my work was to assist Dr. Roshan Namavati. My designation was as Assistant to his office. Since last 23 years I am attached to his office. I have personal knowledge about the inspection in the present case. I am familiar to the signature of Dr. Roshan Namavati. I can identify his signature if it is shown to me. Now I am shown Commissioner's report dated 19/12/2007 i.e Article X-2 which bears the signature of Dr. Roshan Namavati. His signature on Commissioner's Report is at **Ex.75**. I was accompanied with Dr. Namavati when he visited the suit premises. The measurements were taken by me. Dr. Roshan Namavati had asked me to take measurement. The area and measurement shown in Commissioner's report are correct. It is shown on the basis of actual measurements. Commissioner's report is prepared by Dr. Namavati. I cannot say whether the report is true or not”.

8. After perusing the evidence of P.W.2 extracted hereinabove, in my view, the learned trial Judge should have marked this report as 'Exhibit' instead of marking as 'Article-X-2'. P.W.2 deposed that his qualification is Architectural Draftman Civil Engineer. He was assistant to the Commissioner Dr. Roshan H. Namavati since last 23 years and he is attached to office of the Commissioner. He has personal knowledge in respect of the present case and that he is

familiar to the signature of Dr. Roshan Namavati and he can identify his signature. He further deposed that he accompanied Dr. Roshan Namavati. He visited the suit premises and carried on measurements at the instance of Dr. Roshan Namavati. He further deposed that the area and measurement shown in the Commissioner's report are correct. Merely because he deposed that he cannot say whether the report is true or not, the learned trial Judge was not justified in not marking the report as exhibit.

9. Mr. Moghe relied on clause 25 of Chapter XXVII which reads thus;

“525. The provisions of Order XIII, Rules 6 and 7, Civil Procedure Code, do not apply to Vakalatnama, summons and other formal documents. All such documents, should, when filed, be endorsed with the number and year of the case, and the number of exhibit assigned to it in the Roznama and placed on the record”.

as also paragraph 10 of the decision of **Vij Kamagar Sahakari Patsanstha Limited** (supra). A perusal of clause 525 extracted hereinabove shows that provisions of Order-XIII, Rules 6 and 7 of C.P.C do not apply to Vakalatnama, summons and other formal documents. No judgment is cited to substantiate that the Court Commissioner's report is a formal document.

10. In view thereof, I do not find that clause 525 of Chapter XXVII of the Civil Manual is applicable in the present case. In so far as decision of this Court in **Vij Kamagar Sahakari Patsanstha Limited** (supra) is concerned, the order of the Appellate Court appointing Court Commissioner under Order-XXVI, Rule-9 was subject matter of that Petition. In the present case, after appointment of Court Commissioner, as he died, his assistant who is P.W.2 was examined. I have already extracted relevant portion of his evidence. In view thereof, in my opinion, learned trial Judge was not justified in not marking Commissioner's report separately. Hence, the impugned order is modified. The

learned trial Judge shall mark the Commissioner's report dated 19th December, 2007 separately as Exhibit. Mr. Moghe submitted that as the Commissioner's report was not marked exhibit, defendant No.2 did not cross-examine P.W.2. Mr. Uraizee assures that he will ensure presence of P.W.2 for facing cross-examination on behalf of defendant No.2. In view thereof, the learned trial Judge will permit defendant No.2 to cross-examine P.W.2. All objections of defendant No.2 are kept open to be decided in the suit. Rule is made absolute in above said terms with no order as to costs.

[R.G. KETKAR, J.]