

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

C.R.P.NOS.5285 AND 5287 OF 2015

COMMON ORDER:-

Since both the revisions are filed questioning the order passed in applications filed under Order XVIII Rule 17 read with 151 CPC to recall the Advocate Commissioner and marking of his report, they are being disposed of by this common order.

2. The applications were heard by the court below and dismissed even before they are numbered. Challenging the order, dated 23-11-2015 in G.R.Nos.1445 and 1446 in O.S.No.61 of 2000 on the file of the court of Junior Civil Judge, Gajapathinagaram dismissing the applications, the present revisions petitions are filed.

3. This Court has heard Sri M.Ramakanth, learned counsel for the revision petitioner and learned Government Pleader for Arbitration (A.P) for respondents. Sri M.Ramakanth, learned counsel states that he has given up the claim against respondent No.5. Notice sent to the respondent No.8 is returned un-served as "there is no such addressee". Respondent Nos.9 to 12 are not the necessary parties as per the endorsement.

4. The short and simple question that arises for consideration in these cases is whether the impugned order rejecting the request is correct or not?

5. It is an admitted fact that an Advocate Commissioner was appointed by the court below. It is also an admitted fact that the said Advocate Commissioner filed his report. The fact also remains that the Advocate Commissioner's report was not received formally in evidence and marked. Therefore, these interlocutory applications came to be filed seeking permission to mark the Advocate Commissioner's report. It is the contention of the learned counsel for the revision petitioner that Advocate Commissioner was not examined at all in the lower court and, therefore, as the report of the Advocate Commissioner has to be marked, he sought permission to examine the Advocate Commissioner. The court below apparently heard both sides and dismissed the applications on the ground that the petitioner failed to mention the reason why he could not examine the Advocate Commissioner at the earliest. The court also felt that the applications are filed to protract the litigation as they are filed in the middle of the arguments and the case is very old case.

6. The learned counsel for the revision petitioner points out that a hyper technical view was taken. The learned

counsel also submits that the petitioner is a cultivator/small farmer and that he is not conversant in English or with legal procedures and, therefore, he blindly trusted his lawyer and signed on the affidavit. It is his contention that if the Advocate Commissioner is allowed to be examined, the court can also come to a correct conclusion, as the suit is filed for declaration and mandatory injunction and for removal of the constructions etc., The learned counsel also concedes that he has no other evidence to produce except the evidence of the Advocate Commissioner. Therefore, he prays for allowing the revision petitions.

7. In reply thereto, the learned Government Pleader for Arbitration vehemently opposes the contention raised by the learned counsel for the petitioner. It is his contention that despite adequate opportunities, the petitioner did not examine the Advocate Commissioner. The learned Government Pleader also points out that the purpose of appointing the Advocate Commissioner is to gather the evidence and that this is not permissible under law. The learned Government Pleader further submits that the lower court is right because there is virtually no mention in the affidavit as to why the Advocate Commissioner's report was not marked and why the said Advocate Commissioner was not examined earlier. Therefore, the learned Government

Pleader supports the order and prays that the revision petitions may be dismissed.

8. This court, after hearing both the learned counsel, is of the opinion that it is a fact that the affidavit is not well drafted. It does not spell out in clear terms why the Advocate Commissioner was not examined earlier and why his report was not marked. The fact, however, remains that the sum and substance of the affidavit is that the Advocate Commissioner could not be examined earlier and that there is a necessity and therefore it is "necessary" to examine the Commissioner and mark his report. It is a fact also that the deponent of the affidavit, as can be seen from the record, is aged about 78 years and living by cultivation. The contention of the learned counsel for the petitioner that the party has trusted his counsel and signed on the affidavit is also a fact that cannot be doubted as parties do rely on their counsel and repose confidence in their ability. For any fault of the Advocate, the party should not suffer.

9. In these circumstances, this court is of the opinion that the petitioner should be given an opportunity to examine the Advocate Commissioner and mark his report. As the suit is of the year 2000 and as the learned counsel fairly concedes that he has no other evidence except the Advocate Commissioner's evidence, this court is of the

opinion that the revision petitions should be allowed and an opportunity should be given to the petitioner to examine the Advocate Commissioner and mark his report. The opposite party will not be really prejudiced as they have the opportunity to cross-examine the Advocate Commissioner.

10. It is, however, made clear that the petitioner should be permitted only to examine the Advocate Commissioner and mark his report. No other oral or documentary evidence is allowed.

Accordingly, these two revision petitions are allowed and the impugned orders are set aside. The lower court is directed to proceed with the matter on a priority basis without granting adjournments and to deal with any requests for adjournments very firmly and as per law. The lower court is also directed to proceed with the case without in any way being influenced by what is mentioned in this order. No costs. Miscellaneous Petitions pending, if any, in both the revisions petitions shall stand closed in consequence.

08-11-2018
TSNR

D.V.S.S.SOMAYAJULU,J