

HON'BLE SRI JUSTICE N.BALAYOGI
CIVIL REVISION PETITION No.5573 of 2012

ORDER

The petitioners, aggrieved by the order dated 19.10.2012 in I.A.No. 1927 of 2012 in O.S.No.344 of 2008, preferred this Civil Revision Petition on the ground that the order of Court below failed to understand the purpose, nature, scope and jurisdiction while considering the application for cross examination of the Advocate Commissioner and failed to see that the finding of the court below that 'the Advocate Commissioner's report is part and parcel of the record' is only justified in the event of the Commissioner answering the work memo and hence, objections raised by the petitioners to permit to cross examination of the Advocate Commissioner.

2. More so, per contra, the respondent's counsel stated that the report submitted by the Advocate Commissioner is part and parcel of the record and question of cross examination of the Advocate Commissioner will arise only on the arisen of evidence in chief, as such, this Revision Petition is not maintainable.

3. In this case notice before admission was issued on the respondents. Since it is only against the draft order both parties agreed to advance arguments in the main Civil Revision Petition.

4. The petitioners/defendants filed I.A.No.1927 of 2012, seeking permission to cross examine the Advocate Commissioner. The record shows that the contention of the petitioners/defendants is that the Advocate

Commissioner during the course of execution of the warrant expressed his inability to answer the work memo filed by the petitioners, stating that the counsel for the respondent/plaintiff objected for answering the work memo. The first defendant filed I.A.No.2274 of 2011 for redirecting the Advocate Commissioner to answer the work memo. The Court below, by order dated 23.01.2012, redirected the Advocate Commissioner to measure the plots according to the boundaries prescribed in the sale deeds in favour of the plaintiffs and defendants. The petitioner stated that the Advocate Commissioner did not execute the warrant stating that the petitioners/defendants are not cooperating for execution of the warrant to answer the work memo filed by the first defendant.

5. The petitioners / defendants filed work memo before the Advocate Commissioner on 16.10.2011 which contains 9 points as follows:

- 1) The learned Commissioner is requested to identify the 30 feet road i.e. quarry street on the northern side of R.S.No. 25/2
- 2) The learned Commissioner is requested to identify the Ac.4.48 cents of land in R.S.No. 25/2, as shown in the plan appended to the registered document bearing No. 2451/48 dated 11.07.1948, as well as the FMB.
- 3) The learned Commissioner is requested to identify the north-western corner of R.S.25/2 as well as the North-Eastern corner of the same survey number with the plan appended to the registered document bearing No. 2451/48 dated 11.07.1948, as well as the FMB or any other document available with the surveyor, whose assistance is being taken by the learned Commissioner.
- 4) The learned Commissioner is requested to measure the width of quarry road (northern side road), on the basis of the aforesaid identified boundaries.
- 5) The learned Commissioner is requested to note as to whether the width of the road and alignment of the northern side road as shown

in the plan appended to 1948 document tallies with the ground position or whether the width of the road and its alignment do not tally with the existing ground position.

- 6) The learned Commissioner is requested to note the measurement of each of the plots bearing Nos. 1 to 6, 19 to 30, on ground to ascertain as to whether the enjoyment is in accordance with the plan appended to 1948 document.
- 7) The learned Commissioner is requested to note the linear measurements of plot No. 30 from all the directions.
- 8) The learned Commissioner is requested to note that the alignment of plot Nos. 30 and 25, in Aravinda Street, is alike and that the alignment of the road in between plot No.30 and 36 is different. The learned Commissioner is requested to note the difference in between the width of the said road in between the plot Nos. 19 and 30 as well as 18 and 31.
- 9) The learned Commissioner is requested to identify as to whether the division of plots bearing Nos. 1 to 6 on one hand and 19 to 24 on the other hand, is alike with the same alignment, on ground by examining the physical possession and enjoyment of the respective plots as well as on the basis of measurements of the respective plots.

6. Record further goes to suggest that the re-entrustment of warrant to the Advocate Commissioner is to measure the plaint schedule property with regard to the sale deeds in favour of the plaintiff and defendants and not with reference to the sale deeds of the predecessor title.

7. The record further goes to suggest that the evidence on both sides closed on 27.07.2011. The trial court dismissed I.A.No. 1927 of 2012 by order dated 19.10.2012. One year 3 months has been spent on the Advocate Commissioner report and objections. In the light of the above observations the question of cross examination of Advocate Commissioner does not arise.

8. The learned counsel for the petitioner placed on record a judgment in the case of **Smt. Vadde Rajeswaramma v Dr.V.L.Narasimha Charyulu** ¹.

In the above judgment this Court held as follows:

“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 has made the investigation. It is open for the parties also to examine the Commissioner on matters referred to him in his report or on the manner in which he had conducted the investigation. 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 of evidence which could be relied upon at the stage of disposal of the suit.”

9. In the instant case, the Advocate Commissioner was appointed initially on 29.08.2011, on the application made by the respondents in I.A.No.798 of 2008 in O.S.No.344 of 2008. Then the petitioners / defendants, herein, gave work memo to the Commissioner, for which the Advocate Commissioner expressed his inability to answer the work memo filed by the petitioners, stating that the respondent’s counsel objected for answering the work memo. The 1st defendant who is 1st petitioner herein filed I.A No.2274/2011, seeking re-enstrustment of the warrant. By order dated 23.01.2012 the warrant was re-enstrusted. The plaintiff / respondent objected for execution of the warrant and counsel for the respondent filed Memo on 24.06.2012, stating that there is no necessity for Advocate

¹ 1998 (1) A.P.I.J. 292 (HC)

Commissioner to visit the plots and take measurements again in view of the earlier report dated 02.11.2011. Therefore, the warrant was taken out. It is also the fact that the evidence on both plaintiff / respondent as well as defendants / petitioners was closed and the suit is at the stage of documents and at this stage, the present application is filed.

10. The only question in this application is “whether the petitioners / defendants to the suit have a right to get an Advocate Commissioner examined with regard to his report or not ?

11. Order XXVI Rule 9 & 10 empowers report of a Advocate Commissioner. Rule 10 empowers the Commissioner to file his report in writing signed by him, to the Court and if the court is not satisfied with the report filed by the Commissioner on the objections raised by the opposite party, it may re-direct the order and accordingly the warrant was re-entrusted to the petitioner second time. According to sub-rule (2) to Rule (10) of Order XXVI, the report of the Advocate 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 dispute regarding execution of the Advocate Commissioner report as evidence during the trial and marking report of the Advocate Commissioner as part of the record.

12. However, before the report is made part of the record and taken as piece of evidence, it is open to the Court to examine the Commissioner on matters referred to him in his report or as to the manner in which he has made the investigation. It is open for the parties to examine the

Commissioner and matters referred to him in his report or on the manner in which he had conducted the investigation. The report of the Advocate Commissioner becomes final and part and parcel of the record and also can be taken as piece of evidence when there is no objection to the report by either parties or the Court objected for it. Since, the petitioner / defendant raised objection to the Commissioner report and also his return of the warrant after re-enstrustment, no specific warrants to examine the Advocate Commissioner, I have no option except to order to examine the Advocate Commissioner as a witness and permit the petitioners to cross examination, unless, in such circumstances, the Commissioner is examined his report neither form part of the record or it became a piece of evidence and for consideration at the stage of disposal of the suit.

13. Therefore, in view of the facts and circumstances of the case, I am of the considered view that the order by the trial Court suffers with legal infirmities as it was dismissed with the findings that the evidence was closed on 27.7.2011 and on the date of pronouncement of orders one year three months has been spent on the Advocate Commissioner report and objection. Hence the order of the Court below is liable to be set aside.

14. Accordingly, the Civil Revision Petition is allowed, setting aside the order dated 19.10.2012 in I.A.No. 1927 of 2012 in O.S.No.344 of 2008 passed by the Principal Senior Civil Judge, Vijayawada, directing the Trial Court to examine the Advocate Commissioner as the Court witness and permit the petitioners / defendants to cross examine the witness on his report and objections. The Trial Court is further directed to summon the

Advocate Commissioner for a date to be fixed by the Court so that he is examined in the light of his report by the parties to the suit. No costs.

Miscellaneous petitions, if any, pending, stand closed.

JUSTICE N.BALAYOGI

Dated: 19.11.2018

JR



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