

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P. Nos.93 & 105 of 2019

COMMON ORDER:

These two Revisions arise out of the same suit between the same parties and so they are being disposed of by this common order.

2. Petitioners herein are defendants in O.S.No.7 of 2001 which the respondents filed for partition of plaintiff schedule properties.

3. Admittedly, preliminary decree has been passed in the suit. Thereafter, two separate applications I.A.No.344 of 2008 and I.A.No.794 of 2013 were filed to pass final decree. In these applications, same Advocate Commissioner was appointed to file a report as to how the properties are to be divided.

4. Petitioners have filed objections to reports of the Advocate Commissioner to both the final decree itself.

5. They filed the applications in I.A.No.785 of 2016 in I.A.No.344 of 2008 and I.A.No.499 of 2016 in I.A.No.794 of 2013 requesting the Court to permit them to cross-examine the Advocate Commissioner.

6. These applications were dismissed on 29.08.2016. Petitioners then questioned the same in CRP.No.5183 of

2016 and an elaborate order was passed disposing of these Revisions stating that after hearing, if the Court feels that there is a necessity for clearing any cloud or doubt by the Advocate Commissioner, it can cause examination of Commissioner as a Court witness with a right of cross-examination of both the parties.

7. Thereafter petitioners filed I.A.No.2046 of 2017 in I.A.No.974 of 2013 stating that petitioners have filed a memo dated 31.01.2017 seeking to lead evidence in order to substantiate their plea that the Advocate Commissioner should be summoned for cross-examination; that said memo had been rejected, this was assailed in CRP.No.1631 of 2017 and on 21.06.2017 this Court in the said CRP granted liberty to the petitioners to move appropriate applications before the trial Court for examination of any witness; that thereafter petitioners had filed I.A.No.2046 of 2017 to permit them to lead evidence in I.A.No.794 of 2013 and I.A.No.2045 of 2017 in I.A.No.344 of 2008.

8. Counter affidavits were filed opposing these applications contending that said liberty cannot be given in the light of the orders passed in CRP Nos.5069 & 5183 of 2016.

9. By separate orders dt.27.08.2018, the Court below dismissed both the applications. It observed that Advocate

Commissioner acts as representative of the Court as it is not practical for the Court to sit upon for division of the property by metes and bounds on ground, as per the shares allotted under the preliminary decree. It observed that parties can file objections to the said report; and in case it is found by the Court, upon considering the objections filed by the petitioners and after hearing both the parties as to the objections to the Commissioner's report, and before accepting the Commissioner's reports in toto and allow it form part of the record, it can examine the Commissioner on any ambiguity or material part of the record and at that point of time, the petitioners can exercise their right to examine the Advocate Commissioner. It also observed Order 26 Rule 13 and 14 did not contemplate for calling Advocate Commissioner before the Court for the purpose of cross-examination by the party who raised the objections to the Commissioner's report.

10. Challenging the same, these two Revisions are filed.

11. Counsel for petitioners contended that the prayer of the petitioners is to permit the petitioners to lead evidence in I.A.No.794 of 2013 and I.A.No.344 of 2008 to substantiate the petitioners' contentions that there is a necessity to summon the Advocate Commissioner for his cross-examination; that this he has permitted vide order dt.28.11.2016 in CRP.Nos.5069 and 5183 of 2016, and the

Court below misunderstood the prayers and passed orders as if petitioners are again seeking to cross-examine the Advocate Commissioner.

12. Counsel for the respondents vehemently opposed the application of the petitioners and contended that there is no permission granted in the order passed in the above CRP's permitting the petitioners to lead evidence.

13. Heard both sides.

14. In the orders dated 28.11.2016 in CRP.Nos.5069 and 5183 of 2016, this Court has held as under:

“.....irrespective of dismissal of the earlier petitions on the application of the parties to call for the commissioner to be examined with reference to the report in relation to the division of properties for the parties have no such right to consider the objections of parties to the report and if necessary to re-entrust the warrant to the commissioner and after hearing where found such necessity does not arise and still there is any necessity of any cloud to be cleared by the commissioner, to cause examine the commissioner as a Court witness, with right of cross examination to both parties. There shall be no order as to costs.”

15. A reading of the orders seems to suggest that this Court did leave open the question about cross examination of Advocate Commissioner as a Court witness, however, after hearing if it was found that such necessity arose and there is a cloud to be cleared by the Commissioner.

16. Therefore, counsel for the respondents is not correct in contending that petitioners were denied the opportunity to lead evidence and establish that there is necessity to cross-examine the Advocate Commissioner as a Court witness.

17. A reading of the impugned orders indicates that the Court below did not properly notice the prayer in I.A.No.2045 and 2046 of 2017 and seems to have proceeded on the presumption that petitioners again want to cross-examine the Advocate Commissioner.

18. The Court below was clearly under a misconception because petitioners in fact wanted to lead evidence to establish that there is necessity to cross-examine the Advocate Commissioner, because such opportunity has been granted to them by this Court in its order dt. 28.11.2016 in CRP.Nos.5069 & 5183 of 2016 so the Court below cannot deny the same to the petitioners.

19. Accordingly, the Revisions are allowed; orders dated 27.08.2018 in I.A.No.2046 of 2017 in I.A.No.344 of 2008 and I.A.No.2046 of 2017 in I.A.No.794 of 2013 in O.S.No.7 of 2013 are both set aside; and both the applications are allowed and the petitioners are directed to lead evidence on two consecutive dates either in April, 2019 or in June,

2019; and if the respondents wish to lead the rebuttal evidence, they can also do so on the subsequent days; and both parties should cooperate with the early disposal of the final decree petitions thereafter. No costs.

20. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

03.04.2019

dv

