

01.04.2026
Item No.33
Court No. 30
MKP

CO 666 of 2022

Pawan Kumar Agarwal
-vs-
Parbati Chorone Roquitte

Mr. Saptansu Basu, Sr.Adv.
 Mr. Vinay Kumar Purohit
 Mr. Safdar Azam

..... for the Petitioner

Mr. Souradipta Banerjee
 Mr. Avirup Mondal
 Mr. Ranojoy Mullick
 Mr. Aniket Agarwal

.....for the Respondent/O.P.

- 1.** The civil revision has been preferred challenging an order dated no.128 dated February 23, 2022 passed by, Learned Judge, 6th Bench, Small Causes Court at Calcutta in Ejectment Suit no.494 of 2010.
- 2.** Vide the impugned order, the Learned Trial Court considering the objection filed by the petitioner herein, allowed the prayer of the plaintiff/opposite party herein, marking the Engineer Commissioner's Report, dated 21.11.2015, as 'exhibit', as the Learned Engineer Commissioner's had expired.

3. The defendant/petitioner herein, has filed written objection before the Trial Court and submitted that a document to be marked as 'exhibit' has to be duly proved as per the Indian Evidence Act and in the present case, as there are specific objections raised by the defendant/petitioner herein, in respect of the said report, it cannot be marked 'exhibit' without examination of the Commissioner, whose examination in this case is not possible, due to his demise.

4. The Learned Trial Court while deciding, whether the report can be accepted without examining Engineer Commissioner's, came to the finding as follows:

"But here a peculiar circumstances has arisen because during pendency of the suit, the Engineer Commissioner's has expired. So there is no scope to examine or cross-examine the Engineer Commissioner's. But it does not mean that the report of the Engineer Commissioner's is to be thrown away or brushed aside. As per Rule 10(2) of the Order XXIV of the CPC, as soon as the report of the Commissioner's is submitted, it forms part of the record and the evidence taken by him shall be evidence in the suit. Examination or cross-examination of the Commissioner's is not a per-requisite for considering the

report as a part of the record or evidence. It is the intention of the Legislature that the report of the investigation Commissioner's will be considered as evidence without taking him on witness-box. There is no doubt that the here, defendant does not get the opportunity to cross-examine the Commissioner's but that does not straight away negate the report. The defendant will not be prejudiced as he will get opportunity to advance his objection against the report at the time of final hearing/argument."

- 5.** The Trial Court then went further by holding as follows:

"Moreover as per Indian Evidence Act, a document or report, prepared or signed by a person, who died subsequently, is proved by the person, who is accustomed with handwriting or signature of the maker. Here, nobody is disputing the handwriting or the signature of the maker of the report (Engineer Commissioner's) so, in that point also, there is no bar in marking the report in evidence."

- 6.** And while holding and doing so, the Trial Court completely lost track of the fact, that the defendant/petitioner herein, **is challenging the contents of the report submitted by the**

Engineer Commissioner. There was no dispute, regarding the handwriting or the signature of the Learned Advocate Commissioner.

- 7.** Admittedly, the contents of the Advocate Commissioner's report, is not possible to be challenged by the defendant/petitioner herein, due to the death of the Learned Advocate Commissioner.
- 8.** The Trial Court then relied upon the judgment of the Delhi High Court in **(1997) SCC Online Del. 737 (New Multan Timber Store and Others - Vs- Rattan Chand Sood)**, wherein the Commissioner's report under Order 26 Rule 9 CPC, was marked as 'exhibit' without formal proof.
- 9.** But the Court also held that, Court suo moto or at the instance of the parties, could summon the Commissioner for examination as a witness.
- 10.** In the present case, the defendant/petitioner disputes the contents of the report and intends to examine the Advocate Commissioner, who is now not available due to his demise.
- 11.** The Trial Court then proceeded to mark the report as 'Exhibit-16', after dispensing with formal proof. Hence the revision.

12. Affidavit-in-opposition is on record, wherein the plaintiff/opposite party has denied the case of the petitioner herein, and has stated that the impugned order being a reasoned order requires no interference.

13. Both the parties have filed their respective short notes and relied upon the judgments in support.

14. The petitioner herein has relied upon the following judgments:

- i. AIR 1989 SC 1141 (Gopal Saran vs Satyanarayan)*
- ii. (2006) 10 SCC 631 (Subhash Maruti Avasare vs State of Maharashtra)*
- iii. AIR 1975 SC 905 (Phool Kumar vs Delhi Administration)*
- iv. (2007) 13 SCC 476 (Oriental Insurance Company Limited vs Premlata Shukla and Others)*
- v. (2003) 2 ICC 441 (Cal) (Asit Baran Dey & Ors. -vs- Santi Rani Das Dewanji & Anr.)*

15. The plaintiff/opposite party has relied upon the following judgments:

- (i) (1997) SCC Online Del. 737 (New Multan Timber Store and Others -Vs- Rattan Chand Sood)- (relevant portion page 275)*
- (ii) Unreported decision of Madurai Bench of Madras High Court, dated 16th October, 2024 (Nirmala-Vs-*

Ganeshan Nadar & Anr.) (relevant portion para 4).

(iii) **1995 Supp. (4) SCC 600 (Misrilal Ramratan and Others Manshukhal and Other -Vs- A.S. Shaik Fathimal and Others)** (relevant portion paragraph 5)

(iv) **1972 SCC Online AP 149 (Vemuseti Appayamma -Vs-Lakshman Sahu)**

16. On perusal of the judgments relied upon, it appears that both the parties rely upon paragraph 4 of the judgment, in **Asit Baran Dey & Ors. Vs. Shanti Rani Das Dewanji & Anr.(Supra)** and the same being relevant is reproduced herein:

*“4. Upon bare perusal of the said provision, it is abundantly **clear that either of the parties with the permission of the Court may examine the Commissioner’s personally in open Court in relation to his report and the manner in which the investigation was made by the Investigating Commissioner’s.** On the face of the said provision, it does not appear that such examination would be permissible only in the event of an objection being raised against the said report. Such examination in the facts and circumstances of the case may be by any of the parties to the suit who may support such report.”*

17. The said paragraph has been reproduced here for its relevancy, though the said judgment relates to cross-examination by a defendant, whose prayer for cross examination was

rejected, on the ground that no written objection was filed against the report.

18. The Court then had proceeded to allow the party who had filed an objection, to examine the Engineer Commissioner.

19. In the present case, admittedly, the Learned Commissioner is not available for examination, though a written objection against the said report has been filed by the defendant/petitioner herein.

20. A Commissioner's report submitted by an expert is subject to objections. The defendant/petitioner has noted specific objections in respect of the said Commissioner's report and such objection if not put to the Commissioner's, for his expert opinion and clarification, may prejudice the case of the petitioner, herein.

21. The petitioner has noted objection as to the measurement and description of the suit property in the Commissioner's report. As such, this Court is of the view that in the interest of justice, a new Advocate Commissioner is required to be appointed for a limited investigation, only in respect of the dispute as raised in the written objection by the petitioner herein and as such, the portion of the

report which is not objected to, shall remain part of the Court's record.

22. Considering the said circumstances, the total report is not required to be set aside.

23. Accordingly, the impugned order dated is modified to the extent that the Trial Court shall appoint a new Engineer Commissioner to conduct an investigation, limited only to the objection raised by the petitioner herein, in his written objection.

24. The said limited investigation shall be conducted strictly, as per the provision of Order 26 Rule 9 CPC, in the presence of both the parties.

25. The Trial Court shall make all endeavour to ensure that the "limited" local investigation is concluded within a specified period, preferably within a period of 2(two) months from the date of communication of this order and the Trial Court shall then proceed with the disposal of the suit expeditiously.

26. The civil revision stands **disposed of**.

27. Applications, if any, connected thereto stand disposed of consequently.

28. Interim order, if any, stands vacated.

29. Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

(Shampa Dutt (Paul), J.)