
(2004) 02 AP CK 0111
In the Andhra Pradesh High Court
Case No : CRP No. 6516 of 2004

D. Sudershan and Another	Vs	APPELLANT
Vangapally Venkata Rama Rao and Others		RESPONDENT

Date of Decision : 03-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10

Citation : (2004) 3 ALD 528 : (2004) 1 APLJ 292

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K. Venumadhav, for the Appellant; D. Bhaskar Reddy, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Heard Sri K. Venumadhav, the learned Counsel representing the revision petitioners and Sri D. Bhaskara Reddy, the learned Counsel representing the respondents in the civil revision petition. CMP No. 1761 of 2004 was filed to vacate the interim stay granted in C.M.P. No. 28796 of 2003 in CRP No. 6516 of 2003, dated 12.12.2003. During the course of hearing of the vacate petition, both the learned Counsel made a request to dispose of the C.R.P. itself and hence the CRP is taken up for final hearing and the same is being disposed of.

2. The petitioners, who are the defendants in the main suit, aggrieved by an order dated 12.11.2003 made in I.A. No. 155 of 2003 in OS No. 12 of 2001 passed by the Junior Civil Judge, Metpalli preferred the present CRP under Article 227 of the Constitution of India.

3. Sri K. Venunadhav, the learned Counsel representing the revision petitioners had drawn the attention of this Court to the order dated 27.8.2001 made in I.A. No. 88 of 2001 in O.S. No. 12 of 2001, wherein it was observed that the Court below is satisfied with the self-same report of the Commissioner filed in the suit.

The learned Counsel also submitted that the said order was questioned by way of CRP " No. 5352 of 2001 and the same was dismissed giving liberty to the petitioners to avail such other remedies. Inasmuch as the other remedies were not availed by the petitioners, the said finding relating to the satisfaction of the Court in relation to the report of the Commissioner had attained finality. The learned Counsel further submitted that since certain additional facts were brought to the notice of the Court in the rejoinder or additional written statement, as the case may be, the learned Judge had appointed the self-same Commissioner, which cannot be sustained. The learned Counsel for the petitioners placed reliance on the decision of this Court in *M. Chenna Venkata Reddy and others Vs. A.P. Housing Board, Gruhakalpa, Hyd. and others*, .

4. On the contrary *Sri D. Bhaskar Reddy*, the learned Counsel representing the respondents had taken this Court through the observations made by the learned Judge at Para Nos. 6, 7 and 8. He contended that the subsequent events and the additional material available on the relevant date had been taken into consideration and after recording that the Court was not satisfied with the report, again reappointed the self-same Commissioner setting aside the report of the Commissioner already filed in I.A. No. 36 of 2001 in O.S. No. 12 of 2001. The learned Counsel also submitted that CRP No. 5352 of 2001 was dismissed only on the ground that inasmuch as it was only an interlocutory order, as against such order, revision u/s 115 C.P.C., could not be maintained in view of the ratio of *Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others*, . The learned Counsel for the respondents also submitted that when a finding relating to dissatisfaction of the report of the Commissioner had been recorded, the learned Judge is perfectly at liberty to exercise the discretion and at best it would amount to re-entrustment of warrant to the self-same Commissioner and in this view of the matter, the said order need not be disturbed. The learned Counsel for the respondents also placed reliance on the judgment in *Guthula Satyamma and Others Vs. Rudraraju Venkataraju and Others*, .

5. Heard both the Counsel.

6. The respondents/plaintiffs filed O.S. No. 12 of 2001 on the file of Junior Civil Judge, Metpalli for declaration of title, recovery of possession and mandatory injunction. An application in I.A. No. 36 of 2001 was moved for appointment of an Advocate-Commissioner to note down physical features of the plaint schedule property and the said application was allowed on 22.3.2001. The Advocate-Commissioner had gone to the spot and had measured the land as per the warrant issued by the Court below and as per the work memos filed by the respective parties. The said Advocate-Commissioner was also examined by the Court as a Court witness and he was also cross-examined, after accepting the report filed by him. The respondents herein-plaintiffs in the suit, being not satisfied with the report of the Commissioner moved I.A. No. 88 of 2001 for appointment of second Commissioner and the said application was dismissed on

27.8.2001 by the learned Junior Civil Judge observing that the respondents/ plaintiffs cannot seek collection of evidence and a finding was also recorded that the report already filed was satisfactory. Aggrieved by the same, C.R.P. No. 5352 of 2001 was preferred, and the said C.R.P. was dismissed by this Court as not maintainable u/s 115 of C.P.C. in the light of the ratio in the judgment cited *Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers (supra)*. Though liberty was given to avail the other remedies, it is brought to my notice that no such C.R.P. had been moved under Article 227 of Constitution of India. It is therefore needless to say that the order made in I.A. No. 88 of 2001 had attained finality. Subsequent thereto the respondents/ plaintiffs moved I.A. No. 155 of 2003 in O.S, No. 12 of 2001 for appointment of Advocate-Commissioner for local inspection in front of the respondents' building, to measure the vacant land existing towards the Eastern side of respondents' building between 40 feet width road and respondents' building. A counter in detail was filed and the same was opposed.

7. The learned Judge at Para No. 6 of the impugned order had recorded all these aspects and had arrived at a conclusion that, in the light of rejoinder and additional written statement, certain additional facts were brought to the notice of the Court and on the strength of the further pleadings having arrived at a conclusion that the report of the Commissioner was not satisfactory, thought it fit to set aside the same and to reappoint the self-same Commissioner. Aggrieved by the said order, the present C.R.P. is preferred.

8. It is no doubt true that an Interlocutory order of this nature of appointment of Commissioner or dismissal of an application in I.A. No. 88 of 2001 as such may not operate as res-judicata, But the fact remains that the Court was satisfied with the report of the Commissioner already filed at a particular stage and whatever the reason may be, in view of the dismissal of C.R.P. No. 5352 of 2001, the said order had attained finality. The learned Counsel also placed reliance on the judgment cited in *Guttula Satyamma and Ors. v. Rudraraju Venkata Raju and Ors. (supra)*, wherein it was held-

"Order 26 Rule 10(3) of C.P.C. specifically enables the Court to make further enquiry through the Commissioner in case the Court is dissatisfied with the proceedings in the earlier report of the Commissioner. In the present case, the lower Court has given reasons for being dissatisfied with the report of the earlier Commissioner and it is justified in re-entrusting the warrant to another advocate. As such, the orders passed by the Court below cannot be said to be illegal in view of the provisions of Order 26, Rule 10(3) of C.P.C."

9. This was a case where two reports of the first Commissioner were found to be conflicting and causing confusion. In the said context, the learned Judge had observed that the Trial Court was justified in entrusting the warrant to another Commissioner. It is pertinent to note that in the present case when already satisfaction had been recorded relating to the report of a Commissioner at a particular stage by the learned Judge in I.A. No. 88 of 2001 and when the said

order had attained finality by virtue of disposal of C.R.P. aforesaid, on the pretext of some additional material, the learned Junior Civil Judge, Metpalli, in my considered opinion, is not justified in setting aside the said report of the Commissioner whatever may be the reasons. It is also pertinent to note that instead of appointing another Commissioner again reappointment of the same Commissioner is made which would be definitely contrary to the finding already recorded in I.A. No. 88 of 2001. Be that as it may, in view of the order passed in CRP No. 5352 of 2001, I am satisfied that the impugned order cannot be sustained and accordingly, the petitioners are bound to succeed in the present C.R.P.

10. However, here is a case where some additional material and other details had been mentioned by the learned Judge, and in view of the subsequent developments of filing rejoinder and additional written statement, if any other additional aspects are to be noted the respondents/plaintiffs are at liberty to move appropriate application, in this regard, if they are so advised.

11. It is needless to say that for the self-same purpose second Commissioner cannot be appointed unless, the report of the first Commissioner is set aside. The learned Judge is at liberty to dispose of any such application, which may be moved, on the strength of the additional material, which had been relied upon by the learned Judge in the facts and circumstances of the case. Except giving the above direction, no other relief can be granted in favour of the respondents/plaintiffs in the peculiar facts and circumstances of the case.

12. Accordingly, the impugned order in IA No. 155 of 2003 dated 12-11-2003 is hereby set aside and the CRP is allowed. No costs.