

Before J. V. Gupta, J.

SHAMBHU DAYAL,—Petitioner

versus

SMT. PUSHPA KANTA,—Respondent.

Civil Revision No. 454 of 1984

May 21, 1984.

*Code of Civil Procedure (V of 1908)—Order XXVI Rules 9, 10 and 18—Evidence Act (I of 1872)—Section 157—Application for appointment of a local commissioner—Such commissioner appointed without notice to the opposite party—Local commissioner also not issuing notice to parties before inspecting the spot—Report of the commissioner—Whether admissible in evidence—Local commissioner appearing as a witness and proving his report—Such report—Whether admissible under section 157 of the Evidence Act.*

*Held*, that if no notice is issued under Order XXVI Rule 18 of the Code of Civil Procedure to the parties either by the Court while appointing the local commissioner, or by the local commissioner himself intimating his date and time of the site inspection, his report is not admissible in evidence under Order XXVI Rule 10 of the Code. In a given case local commissioner can be appointed under Order XXVI Rule 9 of the Code without issuing any notice to the party opposite but in the application for the appointment of the local commissioner urgency for his appointment must be shown so as to do away with the issuing of any notice to the opposite party. In any case, even if such an order is passed, direction should be given as contemplated under Order XXVI Rule 18 of the Code. Where no such direction is given either by the Court while appointing the local commissioner or by the local commissioner himself before inspecting the premises, the report of the local commissioner is not admissible in evidence.

(Para 4).

*Held*, that where a local commissioner is examined as a witness in Court and the parties have the opportunity to test the veracity of his report by cross-examining him, then his report can be relied upon. Even when there is a breach of Order XXVI Rule 18 of the Code, the report may be relied upon after examining the Commissioner not as a report forming the basis of investigation contemplated by Order XXVI Rule 9, as corroborating the evidence of inspection conducted by the commissioner. The report then becomes admissible in evidence under section 157 of the Evidence Act.

(Para 5).

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*Petition under section 15(6) Haryana Urban Rent Control and Eviction Act, 1973 read with Section 115 C.P.C. for the revision of the order of the Court of Ch. Dharamvir Singh, H.C.S. Rent Controller, Hansi, dated 31st January, 1984, holding that the report of learned Local Commissioner Ex. P.W. 7/A, dated 9th January, 1982 is to be correct and binding and the objections taken by the respondent in his petition dated 6th March, 1982 are over ruled.*

Ajay Lamba, Advocate, for the Petitioner.

Balwant Singh Gupta, Advocate, for the Respondent.

#### JUDGMENT

J. V. Gupta, J.

(1) This revision petition is directed against the order of the Rent Controller, dated January, 31, 1984, whereby the objections filed on behalf of the tenant against the report of the local commissioner were rejected.

(2) During the pendency of the ejectment proceedings before the Rent Controller, the landlady moved the application purporting to be under Order XXVI rule 9, Code of Civil Procedure. (hereinafter called the Code), for appointment of a local commissioner. The learned Rent Controller without issuing any notice to the tenant-petitioner, passed the orders on May 30, 1981, appointing Shri K. B. Deswal, Sub-Divisional Officer, P.W.D. (B&R), Hansi, as the local commissioner. He was directed to visit the disputed house (*kotha*) and also to report about the condition of the *kothari*. It was also directed that respondent will not obstruct the local commissioner in carrying out his duties. Accordingly, the said local commissioner made his report dated January 9, 1982, to which objections were raised on behalf of the tenant-petitioner. It was alleged by him that the said report was not binding upon him as it was against law and facts as no notice whatsoever was given prior to the inspection of the spot by the local commissioner to him, nor any notice was issued by the Rent Controller to him before appointing the local commissioner. Allegations were also made that the local commissioner so appointed was a friend of the husband of the landlady and that he was in collusion with her. Reply thereto was filed on behalf of the landlady controverting the allegations made in the objection petition. However, the issues were framed and the parties were allowed to lead evidence. Ultimately, the Rent Controller found that there was no force in the

objections raised. According to him, the local commissioner was appointed in the capacity of the Sub-Divisional Officer, P.W.D. (B.&R.), and accordingly, he had submitted his report, Exhibit P.W. 7/A and, thus, it could be termed that the report had been submitted by a public servant in order to implement the order of the Court in his official capacity. Thus, the said report was *per se* admissible in evidence. As stated earlier, dissatisfied with the same, the tenant has filed this revision petition in this Court.

(3) The learned counsel for the petitioner contended that in view of the provisions of Order XXVI rule 18 of the Code, where a commission is issued under this Order, the Court has to direct that the parties to the suit should appear before the Commissioner in person or by their agents or pleaders. According to the learned counsel no such direction was either given by the Rent Controller or by the local commissioner. Thus, argued the learned counsel, the report, Exhibit P.W.-7/A, made by the local commissioner, under order XXVI rule 10 of the Code, was in admissible. In support of the contention, the learned counsel relied upon *Seetharamappa v. Appaiah*, (1) *Shrimati Mandera v. Sachindra Chandra*, (2) and *Maroli v. Kunhipathumma*, (3). On the other hand, the learned counsel for the respondent contended that an *ex parte* order for the appointment of a local commissioner could be made under Order XXVI rule 9 of the Code and, therefore, the appointment of the local commissioner by the Rent Controller in this case was also valid. In any case, argued the learned counsel the local commissioner appeared in the witness-box on November 9, 1982, as A.W. 7, and proved his report, Exhibit A.W. 7/A, and therefore, the same was admissible under section 157 of the Indian Evidence Act. Reference was also made to *J. A. Taban v. Khair-Ul-Nisa*, (4) and *Aya Singh v. Hari Ram*, (5).

(4) I have heard the learned counsel for the parties and am of the considered opinion that since no notice was issued under Order XXVI rule 18 of the Code to the parties either by the Rent Controller while appointing the local commissioner, or by the local commissioner himself intimating his date and time of the site inspection, his report was not admissible in evidence under order XXVI rule 10 of the

- (1) A.I.R. 1962 Andhra Pradesh 84.
- (2) A.I.R. 1961 Patna 211.
- (3) A.I.R. 1968 Kerala 28.
- (4) A.I.R. 1970 Delhi 205.
- (5) 1978(2) Rent Law Reporter 479.

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Code. It may be worth noticing here that though in a given case local commissioner could be appointed under Order XXVI rule 9 of the Code without issuing any notice to the party opposite, yet no such case was made out in the case in hand. Nothing was alleged in the application for the appointment of the local commissioner showing urgency for his appointment so as to do away with the issuing of any notice to the tenant. In any case, even if such an order was passed, direction should have been given as contemplated under Order XXVI rule 18 of the Code. Admittedly, no such direction was given either by the Court while appointing the local commissioner, or by the local commissioner himself before inspecting the premises.

(5) As a result of the above discussion, the impugned order is liable to be set aside. However, the report of the local commissioner, Exhibit A.W. 7/A, may be admissible in evidence under section 157 of the Indian Evidence Act, as was held in paragraph 14 of the judgment in *J. A. Taban's case* (supra). It reads,—

“In *Kheru Ram v. Hans Raj*, (6), there is an observation that where a local commissioner is examined as a witness in Court and the parties have the opportunity to test the veracity of his report by cross-examining him, then his report can be relied upon. Reference may also be made to the case in *Maroli Achuthan v. Kunhipahumma*, (7), which is to the effect that when there is a breach of order 26 rule 18 of the Code, the report may be relied upon after examining the Commissioner not as a report forming the basis of an investigation contemplated by Order XXVI rule 9, but as corroborating the evidence of inspection conducted by the Commissioner. We have, therefore, no hesitation in holding that the reports have value and are admissible in evidence even under section 157 of the Evidence Act.”

(6) The net result is that this revision petition succeeds and is allowed with the observations made above to the effect that the report, Exhibit A.W. 7/A, may be considered independently in evidence. The parties have been directed to appear before the Rent Controller on June 12, 1984.

N.K.S.

(6) 1969 Ren C.R. 690 (Punj.)

(7) A.I.R. 1968 Kerala 28.