

John Vs. Kamarunnissa

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Court : Kerala

Decided On : Jul-20-1987

Reported in : AIR1989Ker78

Judge : M.M. Pareed Pillay, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 8, Rule 1 - Order 26, Rule 9

Appeal No. : C.R.P. No. 2055 of 1985

Appellant : John

Respondent : Kamarunnissa

Advocate for Pet/Ap. : Harun Al-Rashied, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

M.M. Pareed Pillay, J.

1. Revision petitioner who is the plaintiff in O.S. 11 of 1985 of the Sub Court. Shertallai challenges the order in I.A. 446 of 1985. Second defendant (respondent herein) filed the petition for taking out a commission for local inspection. The learned Sub Judge allowed the petition.

2. The main contention of the plaintiff is that the trial Court erred in allowing the commission application overlooking the fact that the defendants have not filed written statement. The short question that has to be decided in the C.R.P. is as to whether the Court can issue a commission before filing the written statement by the defendants. Contention of the plaintiff is that defendants have not filed written statement and so the defences available to them were not before the Court and that being the position there was nothing to be elucidated by deputing a commission.

3. Order XXVI, Rule 9, C.P.C. enables the Court to depute a commission for local investigation whenever it considers that it is necessary for the purpose of elucidating any matter in dispute or of ascertaining the market-value of any property or the amount of any mesne profits or damages or annual net profits. The contention of the plaintiff is that the defendants have not filed written statement and therefore no dispute existed at the time when the commission application was allowed by the Court. There is no merit in the above contention. If that approach is adopted it would not be possible for a defendant to immediately bring to the notice of the Court essential facts and materials in his favour by taking out a commission. For filing written statement defendants will have to consider every pros and cons involved in the suit and he will have to go through the documents relied on by the plaintiff or to be relied on by him. For that it would necessarily take time. When defendant receives summons of a case or comes to know of a suit instituted against him he can immediately rush to the Court and ask for a commission to be deputed to make local inspection. If the Court is to wait till written statement is filed the defendant is likely to be deprived of the precious opportunity of bringing facts and materials to the notices o f the Court which are of great relevance for proper and just decision of the case. In certain cases urgent commission will be the need of the hour. Defendant's right to take an urgent commission cannot be defeated on the ground that he has not filed written statement,

4. In the affidavit in support of the commission application the defendants have set out several matters to be ascertained by deputing a commission. In the affidavit it is stated that as against the terms of agreement the plaintiff has used sub-standard and cheap varieties of materials for the construction. It is also stated that

the building constructed is not habitable. It is further stated that the defendants have a genuine claim against the plaintiff and therefore it is necessary to ascertain the quality, nature and cost of materials used for the construction to enable the Court to adjudicate the respective claims of the parties. It is also significant to note that in the affidavit it is clearly stated that local inspection during the monsoon would bring out the nature and quality of the materials and the defective nature of the building. As the defendants have definitely stated that a local inspection would bring out the essential facts and materials necessary to resolve the controversy between the parties and as no oral evidence can substitute the materials gathered during inspection by the commissioner it is highly far-fetched to say that the trial Court erred in allowing the commission application. The contention that the defendants have not filed written statement so far and so the Court has no jurisdiction to issue a commission is clearly untenable. Under Order XXVI, Rule 9, C.P.C. the Court can order local inspection whenever it deems a local inspection to be requisite or proper for the purpose of elucidating any matter in dispute. That being the position it cannot be said that the Court below went wrong in allowing the commission application.

5. There is no merit in the Civil Revision petition. Hence the same is dismissed. There is no order as to costs.

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