

Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Co-operative Society and ors.

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Court : Kerala

Decided On : Mar-22-1996

Reported in : AIR1996Ker276

Judge : B.N. Patnaik, J.

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

Appeal No. : C.R.P. No. 1594 of 1993

Appellant : Payani Achuthan

Respondent : Chamballikundu Harijan Fisheries Development Co-operative Society and ors.

Advocate for Pet/Ap. : M. Sasindran, Adv.

Disposition : Revision allowed

Judgement :

ORDER

B.N. Patnaik, J.

1. Plaintiff in O. S. No. 17 of 1993 on the file of the Munsiffs Court, Payyannur, has preferred this revision against the order in I. A. No. 1063 of 1993 arising out of the said suit. Plaintiff filed the suit in arepresentative capacity on behalf of all the fishermen in the locality. By the impugned order, the learned Munsiff rejected the prayer of the petitioner to appoint a Commissioner for inspection and measurement of the plaint schedule property. The learned Munsiff held that neither party has any grievance about the identity of areas in their respective possession and as such it is not necessary to appoint a Commissioner.

2. Plaintiff filed the suit for a permanent injunction against the defendants restraining them to enter upon his property. The total extent of property in the possession of both the parties is about 200 acres. The defendants, Co-operative Society and others were assigned 105 acres out of it to have an aqua farm. Plaintiff contends that the local fishermen including himself are in possession of the remaining 95 acres of land. They are doing fishing operations in this land since generations and as such they have acquired easementary right over that area. The defendants made attempts to encroach into their area. Hence the plaintiff made a prayer for injunction. It is further contended that unless a clear demarcation of their respective areas of land is made, it may not be possible to implement any order of injunction if passed. The plaintiff therefore filed a petition under Order 26, Rule 9 of the Code of Civil Procedure, for short, the C.P.C., for appointment of a Commissioner.

3. The respondents did not enter appearance although notices were duly served on them. It appears from the records that by 27-1-1996, the service on the respondents was completed.

4. Learned counsel for the petitioner has contended that unless a Commissioner is appointed for measurement and demarcation of the land, the plaintiff and other fishermen will face difficulties in engaging themselves in the fishing operations.

5. The main controversy in this case is as to whether the defendants are in possession of 105 acres or in excess of it, by encroaching into the land of the plaintiff. In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the

methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner. In *Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam*, AIR 1986 Mad 33, it is observed as follows :--

'The object of the local investigation under Order 26, Rule 9 is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but could be taken only from its peculiar nature on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner in effect is a projection of the Court appointed for a particular purpose. In this regard the implication of Order 26, Rule 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. A party has a right to place evidence which he could require to substantiate his case before the Court and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive it. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order 26, Rule 9, When the Court declines to issue the Commission asked for to make local investigation that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. Therefore, an order refusing to appoint a Commissioner under Order 26, Rule 9 to make local investigation and report is a 'case decided' and hence revisable under Section 115'.

I agree with the above view. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26, Rule 9, C. P. C. to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. In this view of the matter, I find that the impugned order cannot be sustained.

For the reasons stated above, the revision is allowed. The impugned order is set aside. The ed Munsiff is directed to appoint the Commissioner as prayed, at the expense of the plaintiff.