

Pillaiyar Vs. Ganesan and Another

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Court : Chennai

Decided On : Nov-10-1999

Reported in : 2000(1)CTC279

Judge : K. Sampath, J.

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

Appeal No. : C.R.P. No. 3004 of 1998 and C.M.P. No 15061 of 1998

Appellant : Pillaiyar

Respondent : Ganesan and Another

Advocate for Pet/Ap. : Mrs. Chitra Venkatesh for ;Mr. S. Subbiah, Adv.

Judgement :

ORDER

1. This revision has been filed against the order of the learned Principal District Munsif, Srivilluputhur, in I.A.No.862 of 1998 in O.S.No.213 of 1998 appointing an advocate Commissioner to inspect the suit property, note down the physical features and file a report along with a plan.

2. The suit has been for a declaration that the pathway covered by the letter CDEFGHI as shown in the plaint plan belongs to the plaintiff exclusively and consequential injunction restraining defendants 1 and 2 and another K. Rajamani

who is the third defendant in the suit, from interfering with petitioner's/plaintiff's possession and enjoyment for a mandatory injunction directing the first respondent herein to close the door way fixed on the parapet wall 'I' for mandatory injunction directing the third defendant in the suit to close the door way kept by him on the parapet wall 'G' and for a permanent injunction restraining the second respondent herein from putting up any construction in the area converted by 'GH' in the plaint plan and for other reliefs.

3. Pending the suit the revision petitioner applied for an interim injunction and notice has been ordered and the injunction application is pending. The respondents herein took out an application in I.A.No.862 of 1998 for the appointment of an advocate Commissioner to visit the suit item 2, measure the same, note down the physical and other features and file a plan along with a report. The allegations in support of the application for the appointment of an Advocate Commissioner are that the respondents and the revision petitioner had been using the second item of the suit properties as common pathway for generations, that this fact has been suppressed by the revision petitioner and he had filed the suit and an injunction application with false facts, that the revision petitioner had after the filing of the suit attempted to block the common pathway and that for appreciating the correct state of affairs that other than the common pathway in suit item 2 the defendants have no other way for passage and these details had to be brought to the notice of the Court and this could be done only by the appointment of an Advocate Commissioner.

4. This application was opposed by the revision petitioner by contending that the pathway shown as suit item 2 belongs to the revision petitioner exclusively, that he has filed the relevant documents to substantiate this along with the plaint, that the respondents have suppressed these facts and claimed rights in the property which is illegal and improper. The revision petitioner further contented that the respondents had not filed any counter in the application for injunction, that an Advocate Commissioner if at all could be appointed only after the respondents filed their counter and their documents and took up a definite stand.

5. The learned District Munsif after setting out the rival contentions of the parties, allowed the application by appointing an Advocate Commissioner. Aggrieved the present revision petition has been filed and it is contented by the learned counsel for the petitioner that the learned District Munsif has not assigned any reason whatsoever for granting the prayer by appointing an Advocate commissioner. The learned counsel vehemently contented that the lower court seriously erred in appointing an Advocate Commissioner even before the respondents set up their defence and disclosed as to how they were making a claim to the suit second item. It is the further contention of the learned counsel that no Advocate Commissioner could be appointed to findout as to who is in possession of the suit property and for this reason alone the order passed by the lower Court is to be set aside.

6. In support of her contentions the learned counsel relied on the following decisions:

(1) K.Raghunath Rao v. Smt. Tumula Jailaxmi, : AIR1988 Ori30 ; (2) Gopal Chettiar (deceased) and 3 others v. P.A.A. Sahul Hameed and another, 1998 (3) LW 773; (3) D.S. Reddy -rep by his power Agent D.P.S. Reddy v. Dr.G.V. Reddy - rep by his power Agent M.S. Murthy and another, : 1999(1)CTC172 and (4) A. Nagarajan v. Madhanakumar, : (1996)IMLJ422 .

7. The respondent are unrepresented. Though they have been served they have chosen not to contest the civil revision.

8. The lower court no doubt, has not given reasons for allowing the application for appointment of an Advocate Commissioner. After extracting the case of the parties in their respective affidavit and counter affidavit the learned District Munsif has straightway appointed an Advocate Commissioner.

9. In D.S. Reddy Etc., : 1999(1)CTC172 Govindarajan, J has held that an order appointing a commission is a judicial discretionary order and should be supported by reasons so that the propriety of exercise of discretion becomes visible. In the case before the learned judge the plaintiff filed the application before the lower court for opening a locker and taking inventory or alternatively for appointment of

an Advocate Commissioner to break open the locker and take inventory. There was no reason given in the affidavit in support of the application by the plaintiff in that case as to why an inventory had to be taken except saying that such inventory was necessary to decide about the future course of action to be taken. The learned Judge in the circumstances of that case held that there were no materials disclosed and the order of the lower court also was bereft of any reason for appointment of an Advocate Commissioner. I do not for a moment say that the lower court need not give reasons in support of its conclusion.

10. In the instant case, as already noticed, the lower court after merely paraphrasing the earlier contentions directed the appointment of an Advocate Commissioner. In my view, this is a case where one has to travel beyond the order of lower court to find out whether the ultimate decision by the lower court to appoint an Advocate Commissioner can be justified. The respondents have clearly stated in their affidavit in support of the application for the appointment of an Advocate Commissioner that the revision petitioner themselves have been using the suit second item as common pathway for generations, that this has been suppressed by the revision petitioner/plaintiff and he had filed the suit and the injunction application with false details and that after filing of the suit he was making attempt to block the common pathway. Having regard to this specific stand taken by the respondents in my view, the lower court was justified in appointing an Advocate Commissioner to visit the suit property, note down the physical and other features and file areport along with a plan. Merely because the learned District Munsif has not given elaborate reasons for ordering the application, the order need not be set aside and it will be inequitable. The apprehension entertained by the respondents may be justified and unless the commissioner visited the property and noted down the physical and other features and filed a report along with a plan, the petitioner might obliterate the state of affairs obtaining at the time of the filing of the suit. It is not an uncommon occurrence that under the cloak of interim orders parties attempt to create the state of affairs matching their case.

11. Let me now refer to the other decisions relied on by the learned counsel for the revision petitioner.

12. In *K. Raghunath Rao v. Smt. Tumula Jailaxmi*, : AIR1988 Ori30 a learned judge of the Orissa High Court interfered with the order of the lower Court appointing an Advocate Commissioner on the ground that the lower court had not recorded the satisfaction supported by reasons. In the very same case, it is stated that,

' though the normal rule is for the appointment of an Advocate Commissioner for local investigation to appreciate the evidence already recorded, there may be departures from the normal rule for issue of a commission also. An illustration could be where evidence is necessary to note the depth of water in a particular season, a commissioner can be deputed even though evidence has not been recorded. Another illustration is where it is to be found as to on which plot the disputed land lies, the commissioner can be appointed.'

It is further stated in that decision that there can be no hard and fast rule in this regard and issue of Commission for local investigation would depend upon the facts and circumstances of each case.

13. I have already stated as to why having regard to the facts and circumstances of this case the order appointing an Advocate Commissioner by the lower court is justified.

14. The next decision relied on by the learned counsel is *Gopal Chettiar (deceased) and 3 others v. P.A.A. Sahul Hameed and another*, 1998 (3) LW 773. In that case an application for inspection of the building and report by Commissioner about alleged changes or waste committed was filed before the Appellate Authority. Objection was taken that a Commissioner was already appointed by the Rent controller and the Commissioner had submitted his report and there were no objection filed his report. It was held by Abdul Wahab, J (as the learned judge then was) that there can be no appointment of Commissioner for collecting evidence or gathering materials.

15. It has been held in a number of decisions and in particular in *In Re Moosa Kutty*, : [1953]23ITR349(Mad) , that,

' the object of a commission under this rule, viz. Order 26, Rule 9 CPC is not to collect evidence which could be taken in Court, but obtain for elucidating matters which are local in character and it is in the discretion of the court to issue it or not. The object is for elucidating any matter in dispute by local investigation at the spot.'

16. In *Mahendranath Parida v. Purnanada Panda and others*, : AIR1988 Ori248 , it has been held that,

' When the Court considers a local investigation to be requisite or/and proper ordinarily it should not decline to issue a Commission.'

17. This is a clear case where it is necessary to obtain evidence which from its peculiar nature can only be had on the spot. The order of the lower Court does not suffer from any illegality or irregularity nor has it been passed in error of jurisdiction though supportive reasons for the conclusion could have been given by the lower court.

18. The matter does not end here. Yet another objection has been raised by the learned counsel for the petitioner that the respondents have not filed their written statement with supporting documents and had not made their case known and in this circumstances the lower court not to have granted the prayer.

19. In *John v. Kamarunissa*, : AIR1989 Ker78 , it has been held that,

' If the court is required to wait till the written statement is filed, then the court will be deprived of a precious opportunity of bringing on record facts of great relevance for just and proper decision of the dispute. Moreover, for filing written statement the defendant will have to go through the plaint as well as the plaintiff's documents. All that it will take time. In the meantime, if certain facts are necessary to be ascertained there can be no legal bar to the issue of commission.'

No doubt, a learned single judge of this court has dissented from the view expressed in the Kerala decision and this decision *A. Nagarajan v. Madhankkumar*, : (1996)IMLJ422 has been relied on by the learned counsel for the revision petitioner.

20. In *Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam*, : AIR1986 Mad33 , the appointment of an Advocate Commissioner was sought for by the defendant in a suit for injunction to restrain him from digging foundation in the plaintiff's land. The defendant contended that the land belonged to him. The Court refused to issue Commission. Nainar Sundaram, J. (as the learned Judge then was) interfered in revision and the reasoning of the learned judge was as follows:

' A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, viz. the third defendant coveting the evidence to place before the court through local investigation by the Commissioner cannot be shut out of that right'.

21. In *Appulu v. A.Fatima Zohra and another*, 96 L.W 369 : 1982 TLNJ 482, it has been held by this court that,

' there may be very many circumstances in which only a commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable right of the parties. It may so happen, when a landlord high-handedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a commissioner appointed forthwith. If the right of the tenant to have access to staircase is constructed, he is most interested in seeking appointment of the commissioner and secure immediate relief for restoring amenities, which is assured to him under the Act...'

22. The urgency in the present case cannot be gain-said. The apprehension of the respondents justified the appointment of an Advocate Commissioner even before their filing the written statement and even before any evidence had come on record. The respondents have also indicated their specific stand in the affidavit in support of the application. It cannot therefore be contented by the revision petitioner that the respondents have not put forward their case. The decision in *A. Nagarajan v. Madhanakumar*, : (1996)IMLJ422 has indeed dissented from the view expressed in *John v. Kamarunnissa*, : AIR1989 Ker78 of the Kerala High

Court. In my view, it cannot be said that there cannot be an Advocate Commissioner appointed either before the written statement is filed or before any evidence is adduced.

23. In fact, in *In Re Moosa Kutty*, : [1953]23ITR349(Mad) it has been held that an application under Order 26, Rule 9 of the Code of Civil Procedure must be made before the case is closed and a commission cannot be issued after the evidence is closed. In the case before the learned Judge Nagarajan v. Madhankumar, : (1996)IMLJ422 the question arose whether a commissioner could be appointed after the closure on his side of evidence by party for the purpose of clarification, explanation and proof of the matter in issue or a fact which required elucidation. We have already noticed that there could be circumstances in which a Commission may be issued even before the evidence is recorded. The learned Single Judge was not deciding and it was also unnecessary to decide that question in that case. The decision has to be confined to the facts of that case.

24. In view of the discussion above, I hold that an exception can be taken to the order though laconic passed by the lower court. The civil revision petition fails and the same is dismissed. Consequently, the stay petitions C.M.P. No.15061/98 is also dismissed. Subordinate Courts would do well to support their order with reasons.