

Rajam Abraham Vs. Shantha

Rajam Abraham Vs. Shantha

SooperKanoon Citation : sooperkanoon.com/807391

Court : Chennai

Decided On : Oct-15-1993

Reported in : (1994)1MLJ301

Appellant : Rajam Abraham

Respondent : Shantha

Judgement :

ORDER

Thangamani, J.

1. The revision petitioner is the plaintiff in O.S. No. 95 of 1992 in the Court of District Munsif of Kodaikanal. He filed the suit for permanent injunction restraining the respondent/defendant from interfering with his possession of the suit property which is a House and vacant site on the northern side of old Survey No. 99/R2-C3 in Lake Road, Kodaikanal Town. He claimed in the plaint that he has purchased this property under a sale deed dated 27.4.1992 from the power agent of the owner Yasumithiran. According to him, the suit was laid since the defendant sought to disturb his possession. Plaintiff also obtained an ex parte injunction in I.A. No. 153 of 1992. Thereafter, the defendant came forward with I.A. No. 167 of 1992 for the purpose of appointment of an Advocate-Commissioner to inspect the suit property, measure the same with the help of qualified Taluk Surveyor and to find out whether the building is situated in Survey No. 99/B-2-C3 alone or in both

Survey Nos. 99/B2-C3 and 99/B2-Cand to note the physical features and file his report with plan. Since the learned District Munsif has allowed the application and ordered appointment of a Commissioner, the plaintiff has come forward with this revision petition.

2. One of the grounds on which the revision petitioner challenges the order of the court below is that the trial court has not passed a speaking order. A perusal of the impugned order discloses that there is no discussion regarding the respective contentions of the parties and why it is necessary that a Commissioner has to be appointed. However, the order of appointment of a Commissioner cannot be quashed on that sole ground, when we are able to see from the materials on record that the facts herein warrant such as appointment.

3. We find from the description in the plaint that the property in dispute is the northern side 5 cents in Old Survey No. 99/B2-C3 in lake Road, Kodaikanal Town. The four boundaries of the said S. No. 99/B2-C3 are also mentioned in the plaint. Though no written statement has so far been filed, the affidavit filed by the defendant in support of the application for appointment of a commissioner reads that the suit vacant site originally balanced to one Dr. B.S. Chellappa. One Balakrishnan claiming as power agent of B.S. Chellappa entered into a sale agreement with the defendant on 15.2.1985. Subsequently, his son Yasumithiran, who got the property by settlement from his vendor acknowledged the above sale agreement and allowed the defendant to put up a construction in the vacant site. The said Yasumithiran undertook to complete the sale subsequently. Believing the said representation of Balakrishnan, defendant has put up a pucca building at a cost of Rs. 6,50,000 in this site. After completing the construction, the defendant came to know that portion of the building measuring 6' x 47' has actually been built in the neighbour's land in R.S. No. 99/B2-C. So she has purchased the adjoining land from its owner under a registered sale deed dated 27.12.1991. Thus, the defendant is in possession and enjoyment of the entire suit property as well as the encroached portion in R.S. No. 99/B2-C. Since the revision petitioner tried to interfere with her possession, she was constrained to file O.S. No. 91 of 1992 on the file of District Munsif, Kodaikanal and an injunction application in I.A. No. 144 of 1992. The present suit has been laid immediately after that injunction

application. The specific case of the present respondent is that her building is situated both in Survey No. 99/B2-C3 and Survey No. 99/B2-C.

4. Learned counsel for the revision petitioner first submits that the defendant has not even filed her written statement in the suit and the appointment of a Commissioner at this stage is premature. There is no merit in the above contention. The case of the present revision petitioner is already stated in the earlier suit O.S. No. 91 of 1992 and so it is not as if we are not in a position to know what is the defence of the present defendant in this case. Order 26, 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. If we are to hold that only after filing of the written statements commissioner could go, 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 defendant 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 U 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 of 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. A single Judge of the Kerala High Court has held in *John v. Kamarunnisa* : AIR1989 Ker78 , where local inspection under Order 26, Rule 9, C.P.C. is requisite and proper for elucidating matters in dispute in the suit, the same cannot be denied on the ground that the defendant has not yet filed his written statement. The said provision places no such bar on the court exercising the power. And I am in respectful agreement with that view.

5. In the counter affidavit before the trial court the plaintiff has mainly dealt with the merit of the suit claim. His counter does not disclose how the appointment of a commissioner is unnecessary in this case and whether he would be prejudiced in any manner if a commissioner goes there and finds out in which exact survey number the disputed building is constructed. His positive averment in his counter is that the disputed structure is in Survey No. 99/B2-C3 alone. He further states that both in this suit as well as in O.S. No. 91 of 1992 the suit property and its measurement and boundaries are one and the same. And there is no dispute between the parties regarding these facts. He also states that if there is any dispute in the suit property regarding measurement, the defendant can very well file the application. In any event, the Commissioner should have been issued only in the earlier suit and not in the case. Evidently there is no substance in the contentions of the plaintiff. It cannot be gain said that local inspection and the measurements of the disputed property by the Advocate Commissioner with the assistance of a qualified Surveyor would bring out the essential facts and materials necessary to resolve the controversy between the parties. And no oral evidence can substitute the data gathered during inspection by the Commissioner. While so, it is far-fetched to say that the trial court has erred in allowing the commission application. 6. In the result, there is no merit in the civil revision petition and the same is dismissed even in the admission stage.