

Arumugham and 3 ors. Vs. Arumugham

Arumugham and 3 ors. Vs. Arumugham

SooperKanoon Citation : sooperkanoon.com/814922

Court : Chennai

Decided On : Oct-25-1978

Reported in : (1979)1MLJ558

Appellant : Arumugham and 3 ors.

Respondent : Arumugham

Judgement :

T. Sathiadev, J.

1. The issue involved whether in the appellate Court a Commissioner can be appointed for the purpose of Ending out the physical features and of the location of the channel, particularly when the matter was pending in the trial Court and there had been two inspections, one on 19th November. 1974 and the other on 12th December, 1974. It appears that the I.A. No. 601 of 1976 was filed by the respondent herein for the same purpose, for which the present commission is being issued. But it was dismissed on 19th November, 1976, since the respondent herein did not press for the same. On this Mr. Thyagaraja Iyer pleads that when the very aspect now involved has already, been posed before the trial Court in I.A. No. 601 of 1976, and the respondent herein having not interested himself in asking for the Commissioner to again visit the property, the appellate Court was not justified in directing the appointment of the Commissioner. He contends that there is no jurisdiction in the appellate Court appointing a Commissioner in matters like

this and relies upon the decision in P. Moosa Kutty In re : [1953]23ITR349(Mad) , to show that the power conferred on the appellate Court under Order 41, Rule 27 read with Section 107(2), and Order 26 Rule 9 Civil Procedure Code disentitle the appellate Court from appointing a second Commissioner. But in this case, it will be seen that the appellate Court has only directed the same Commissioner to do the injunction and commission warrant had been reissued with a direction to find out whether the channel leading to the defendant's land is in the patta land of the plaintiffs or in the puramboke land. The counsel for the petitioners then refer me to the decision in (1968) 81 L. W. 374 J.R. Rajagopala v. T.R. Ramachandra Iyer. I find the learned Judge in that case holding that the lower appellate Courts cannot, as a matter of course appoint a Commissioner merely because it has the power to do so. It should first of all, find out whether the circumstances justify the appointment of a Commissioner. It has been held that the appellate Court has the power, but unless the merits of the matter justify, there can be no question of a fresh Commissioner being appointed.

2. In this context reference is also made to the power of the appellate Court under Section 107, Civil Procedure Code to show that there is no power in the appellate Court to appoint a Commissioner. I do not think such a contention can be entertained, particularly in view of the decision of this Court in 81 L. W. 374 J.R. Rajagopala Iyer v. T.R. Ramachandra Iyer, and when the appellate Court is invested with the power to take additional evidence or to require such evidence to be taken, if the lower appellate Court can go to the extent of recording additional evidence if the ends of justice require in matters like this, there could be nothing against the lower appellate Court appointing the same Commissioner by reissuing the warrant to find out the location of the channel and if the Court considers it relevant for the disposal of the appeal.

3. Counsel for the petitioner pleads that it will be open to him to place before the lower appellate Court the particulars which are required to be collected by the Commissioner, and as to which of them, are irrelevant and extraneous to the matter involved in the suit. Hence, the Court below shall take into account such objections, if any taken and dispose of the same on their merits, when the report is filed.

4. One other aspect that requires to be considered is about the Court below directing the plaintiff to pay the costs involved in the appointment of the Commissioner. It is clear that the Court below had not taken into account the fact that the necessity for the appointment of a Commissioner had arisen, merely because the respondent had preferred an appeal, and as already stated, it was the respondent who filed I.A No. 701 of 1976 seeking for the reissue of the commission and when such a commission is issued the defendant appellant, respondent herein has to pay the costs of the Commissioner and the Court can only collect the costs of the Commission from the respondent herein. To this extent the order is set aside and the C.R.P. is allowed and in other respects, the civil revision petition stands dismissed' No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com