

A. Nagarajan Vs. A. Madhanakumar

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SooperKanoon Citation : sooperkanoon.com/820825

Court : Chennai

Decided On : Jan-10-1996

Reported in : 1996(1)CTC229; (1996)IMLJ422

Judge : Shivappa, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 26, Rule 9; [Constitution of India](#) - Articles 226 and 227

Appeal No. : C.R.P. Nos. 782 and 783 of 1995

Appellant : A. Nagarajan

Respondent : A. Madhanakumar

Advocate for Def. : R. Thiagarajan, Adv.

Advocate for Pet/Ap. : V.R. Gopalan, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Shivappa, J.

1. The Petitioner has challenged the order appointing a Commissioner in a Part-heard case contending it as one without jurisdiction, per se illegal and even

perverse. The facts in brief are, the respondent herein filed R.C.O.P. No. 1274 of 1992 against the petitioner under Section 10(2)(i) for wilful default, 10(2)(v) for acts of waste and 10(3)(a)(i) for owner's occupation of the Tamil Nadu Buildings (Lease and Rent Control) Act, in short Act 18 of 1960 as amended by Act 23 of 1973 (hereinafter referred to as the 'Act'). After completion of the pleadings, the case was taken up for trial on 23.8.1993 adjourned to 7.9.1993. The respondent landlord after examination in part, filed an application for appointment of an Advocate Commissioner to inspect the petition scheduled property occupied by the petitioner herein with a direction to the Advocate Commissioner to avail the services of a civil engineer to submit a report with plan and other enclosures. The said application was opposed by the petitioner herein tenant. After hearing the arguments on the application, order was reserved and case was adjourned from 24.1.1994 to various dates and finally on 1.11.1994, order was pronounced, by the learned Judge appointing the Commissioner. Learned Judge appointed Shri. R.E. Deenatha Rao, Civil Engineer to inspect the property and find out how the property is used by the tenant, whether any damage caused. If damaged, the effect and the extent of it and the condition of the petition scheduled property.

2. The grievance of the petitioner is that the learned Judge has failed to apply his mind to the facts of the case. According to the petitioner, the landlord should prove the grounds of eviction by adducing proper and necessary evidence, if necessary, by examining his own engineer and cannot seek the aid of the Court to prove his case and get all materials and that can be done only after the closure of the evidence to elucidate any matter in dispute. He has further contended that the learned Judge has misread the statement in the counter that the tenant has acceded to the appointment of an Advocate Commissioner. All that was submitted was only to avail the services of his own engineer instead of asking for appointment of an Advocate Commissioner or an engineer. In substance, the landlord can prove and substantiate his case by examining number of witnesses and producing any number of documents, but cannot seek for appointment of a Commissioner through the aid of the Court at the earliest stage and it can be only for elucidation of the matter in dispute and not meant for collection of evidence. Since the order passed by the learned Judge is not appealable, which is merely procedural and does not affect the rights or liabilities of the parties, he has filed a

petition under Article 227 of the Constitution India in view of the decision in *The Central Bank of India Ltd. v. V.S. Gokal Chank*, : [1967]1SCR310 .

3. Learned counsel for the respondent contended that this Court in the guise of exercising its jurisdiction under Article 227 cannot convert itself into a Court of appeal. If an error or fact eventhough apparent on the face of the record cannot be corrected by means of writ under Article 227 of the Constitution and it is open to the petitioner to setforth the error or defect or irregularity, if any, in the impugned order as a ground in his appeal from the final order in the main proceeding and the impugned order is not perverse or illegal since the court has the power to appoint a Commissioner for the purpose of elucidating any matter in dispute. He also submitted that the petition scheduled properties were settled on the respondent by virtue of a deed of settlement executed on 31.5.1975 and the revision petitioner being the eldest son of the family allowed to occupy one portion of the property on a monthly rent of Rs. 200/- and inspite of several litigations, the petitioner is squaring the property and the respondent is unable to get possession and there are no bona fides in the petition and sought for dismissal.

4. The main dispute now revolves round the point is at what stage and when a Commissioner can be appointed by the Court?

Rule 9 of Order 26, C.P.C. contemplates in any proceeding, in which the Court is of the opinion that local investigation is requisite or proper for the purpose of elucidating any matter in dispute it may issue a commission to such person as if thinks fit direct him to make such investigation and to report thereon to the Court (Italic is mine). Such report shall form part of the record. But the Court or with the permission of the Court, any of the parties to the proceeding may examine the Commissioner in open court touching any of the matters referred to him or mentioned in his report as to the manner in which he has made the investigation. Whether the court is, for any reason, dissatisfied with the report, it may direct further enquiry to be made as it shall think fit. The purpose of local investigation is ascertaining, collecting or elucidating facts in respect of any matter in dispute after proper scrutiny of examination and sifting of materials. Elucidate according to Websters Dictionary means 'to make light or clear, to explain, to remove obscurity

from and render intelligible, to illustrate'. According to Chambers Dictionary, elucidate means to make lucid or clear or to throw light upon, to illustrate, making clear, explanatory'. According to the Oxford Dictionary, 'elucidate means to throw light on, explain' etc.

5. For the purpose of elucidating facts in respect of any matter in dispute means where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, to make it clear, intelligible and to throw light upon the matter in issue, means the main dispute as well as the facts leading to the dispute. This course may be adopted after the examination of the party or parties of suo motu. If the court feels that clarification or confirmation is necessary on certain aspects on which the Court entertains doubt in the matters in issue or dispute, or the disputed questions of fact, for the purpose of ascertaining, clarification, or for proper scrutiny and examination, this course can be resorted to. In *P. Moosa Kutty, In re* , this Court has held in any event, an application under this rule must be made before the case is closed. In this view of the matter, appointment of a Commissioner can be resorted to after the evidence of the respective parties being placed. In *Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam* : AIR1986 Mad33 , this Court has taken the view that the party has got a right to place evidence which he could require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is the duty of the Court to receive such evidence, unless there are other justifiable factors in law to decline to receive such evidence. The evidence so collected through the Commissioner may be used to 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.

6. In *Chintapatla Arvind Babu v. K. Balakistamma* : AIR 1992 AP300 , the High Court of Andhra Pradesh has held it is for the parties to decide as to what evidence has to be adduced in support of their plea and it is not for the opposite party or the Court to suggest or to indicate the evidence which has to be adduced. So long as the evidence is relevant and if it is not by way of dilatory tactics, the Court may allow a party to adduce evidence. Order 26, Rule 9, C.P.C. permits a party to

move the Court for appointment of an advocate-Commissioner for local investigation if it is requisite or proper for the purpose of elucidating the matter in dispute. The report of such Commissioner shall be held as evidence in the suit and it forms part of the record under Order-26, Rule 10 C.P.C. When a party complains that the opposite party was attempting to disturb the features, a type of case considered in Ponnuswamy's case : AIR1986 Mad33 , and applies for appointment of a Commissioner under Order 26, Rule 9, C.P.C. refusal to allow such petition where it is most needed may perpetrate gross injustice and prevent the party from having clinching evidence in proving the said fact.

7. In Appulu v. Fatima Zohra and Anr., 1982 T.L.N.J. 483, this Court has held 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 rights 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 tenant to have access to stair-case is obstructed, 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. Therefore, the object is merely to assist the court by placing a report of such local investigation before the Court. Such report is not, in any way, binding on the Court whose power to arrive at its own conclusion, even at variance with such report, is in no way impeded, by such report. The test is how such course aids in establishing the matter in issue or clarifying a fact in doubt and should not become a liver to promote the ingenious litigant to protract litigation resulting in delay in disposal of the matter, It is open to the petitioner to ask for a qualified engineer to be appointed as Commissioner, so that, the report if admitted as evidence could enable the Court to decide the condition of the building, nature of property or right or dispute in question correctly.

8. In Sangili v. Mookan I.L.R. 16 Mad 350, this Court has taken the view that local investigation contemplated has reference to questions relating to the identification of lands, their physical features, market value and estimate of profits, but not to

question of title to, and possession of, the lands themselves. It has been further held that local investigation presupposes the existence on the record of independent evidence which requires to be elucidated, In that case, the Court delegated to a Commissioner the trial of any material issue which it is bound to try, which is not the situation in the instant case. However, in the instant case, Commissioner is called upon to submit the report with the aid of the civil engineer after inspection regarding use, damage caused if any, if damaged the extent and condition of the petition scheduled property. Even in this case, it touches only the physical features, identification and condition of the properties.

9. In *Jagannath v. N. C. Naryanappa* : AIR1982 Kant233 , the High Court of Karnataka has held only after the parties have adduced evidence in regard to matters for better appreciation of evidence, a Commissioner can be appointed. But contrary view has been taken in *John v. Kamarunnissa* : AIR1989 Ker78 . The High Court of Kerala has taken the view that a Commissioner can be appointed before evidence. In *Mahendranath Parida v. Purnananda Parida and others* : AIR1988 Ori248 , the High Court of Orissa has taken the view that local investigation should not be deferred to a stage after the closure of evidence. But that does not mean that in no circumstances can local investigation be sought after the evidence is closed and held that a party has choice and a right to examine a survey knowing person after getting the identification or measurement private done by him, relying on the decision in *P. Moosa Kutty, in re* : [1953]23ITR349(Mad) .

10. It is well settled that Article 227 of the Constitution can be invoked only in the following circumstances, namely, when there is lack of jurisdiction, erroneous assumption of jurisdiction or excess of jurisdiction or where there is gross dereliction of duty, flagrant violation of law, error of law apparent on the face of the record or where there is violation of principles of natural justice and finding is based on no material or whatever which is by very nature arbitrary or capricious. The power conferred on the court to appoint a Commissioner for local inspection is for better appreciation of the evidence already on record. The trial court had the jurisdiction to decide under what circumstances it can appoint a Commissioner. The Commissioner so appointed is not performing a judicial act and it is a

'ministerial Act'. Nothing is left to discretion and there is no occasion to use judgment or adjudicate the issue involved but only noting the details and reporting the actual state of affairs. Such report does not automatically form part of evidence in the proceeding and the court has power to confirm, vary or set aside the report or issue a new commission. Hence there is neither abdication nor delegation of the powers or functions of the Court to decide the issue. Only an examination of the Commissioner, the report forms part of the record and evidence. The opposite party has opportunity to cross-examine the Commissioner. Of course, failure to do so to elicit such information as it required, cannot at later stage object to the report being accepted on the ground Commissioner not examined or cross examined. The contention of the learned counsel that the impugned order is per se illegal, unsustainable and amounts to delegating the functions of the Court to decide the issue are misconceived and hence rejected. The act of appointing a Commissioner cannot be termed as one without jurisdiction. There is nothing like a general bar in this regard. But such power has to be used sparingly and not at the initial stage without any evidence by the party. The wise course would be to place evidence on a disputed question or issue. On placing such evidence by the respective parties, in order to confirm, explain or to throw light on the matter in issue or for elucidation of the fact in issue, commission can always be issued. The impugned order does not suffer from any of the infirmities such as lack of jurisdiction, erroneous assumption of jurisdiction or excess of jurisdiction or violation of law. To ascertain the nature of the extent of the property, manner of use, extent of damage, according to learned Judge is proper for just decision of the case. The Supreme Court in *The Central Bank of India Ltd., v. V.S. Gokal Chund*, : [1967]1SCR310 has held orders such as summing witnesses, discovering, production, inspection of documents, issue of commission, inspection of premises, fixing the date of hearing, admissibility of documents, relevancy of questions are all steps to be taken towards the final adjudication and not open to correct error or defect or irregularity by way of invoking a revisional jurisdiction. If any of the order on these aspects is bad in law, it is open to the parties to raise as one of the ground against the final order. Since the Petitioner has an opportunity to cross examine the Commissioner and also to question the veracity of the report, in the absence of any prejudice, it is not proper to interfere with the impugned order. Learned Judge

ought to have allowed the respondent-petitioner to complete his side of the evidence and then resorted to this course of appointing a Commissioner, if so advised. As has been held by this Court in *Sangili v. Mookan* I.L.R. 16 Mad 350, the word elucidation presupposes the existence of some independent evidence on record. It is reasonable to resort to the appointment of a Commissioner after placing evidence by the respective parties. With respect, I differ from the view expressed in *Johan v. Kamarunnissa* : AIR1989 Ker78 . Thus, I answer the point that Commissioner can be appointed after closure of his side of evidence by a Party for the purpose of clarification, explanation and proof of the matter in issue or a fact which requires elucidation. I see no reason to quash the impugned order, but however, I direct the learned Judge to complete the evidence of the respondent who is the petitioner in R.C.O.P. and then give effect to the order impugned.

11. Having regard to the passage of time consumed in the litigation, both the counsel have agreed to close the entire proceeding before the learned Judge within three months from the date of receipt of a copy of this order by the learned Judge. Their submission is placed on record. Learned Judge is directed to complete the entire case within a period of three months from the date of receipt of a copy of this order without granting unnecessary adjournment and causing further delay. These civil revision petitions are dismissed. Parties to bear their own costs.