
(2007) 02 MAD CK 0309
In the Madras High Court
Case No : C.R.P. (NPD) No. 4232 of 2001

A. Kalabai

APPELLANT

Vs

P. Pattammal, P. Palani and P. Balan

RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2007) 2 MLJ 801

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : Usha Raman, for G.R. Swaminathan, for the Appellant; K.V. Subramanian for M.A. Abdul Wahab, for the Respondent

Judgement

R. Banumathi, J.—This revision is directed against the Order in I.A. No. 1618/2001 in O.S. No. 148/1997 on the file of Principal District Munsif, Pondicherry, dismissing the application filed under Order 13, Rule 1(2) and (3) read with Section 151 CPC, declining to issue summons to the witnesses.

2. Plaintiff has filed the suit for Permanent Injunction restraining the Defendants from encroaching into the suit property and for mandatory injunction. Contending that measurements are not correct and the boundaries given by Plaintiff is incorrect Defendants filed I.A. No. 145/1997, and in that application, Commissioner was appointed and he has filed his report. Plaintiff has filed elaborate objection to the report of the Advocate Commissioner.

3. After the conclusion of the trial, at the stage of arguments, Plaintiff has filed I.A. No. 1615/2001 to reopen the case for the purpose of examination of Plaintiffs. That application was allowed by the Order dated 12.09.2001 and case was reopened to recall P.W.s 1 and 5.

4. Along with application to reopen the case, Plaintiff filed I.A. No. 1618/2001, seeking issuance of summons to the witness viz., (1)Advocate Commissioner; (2)Deputy Surveyor, Pondicherry; (3)Director, National Archives of India, Record

Centre, Pondicherry.

5. That application was dismissed by the trial Court finding that the list of witnesses does not include the above witnesses and no reason has been adduced by the Plaintiff for non-inclusion of witnesses in the previous witness list. It was further observed that the third witness cited viz., Director, National Archives was already examined on the Plaintiff's side as PW-5.

6. The Order is impugned on the ground that when the Court had reopened the case for the purpose of recalling P.W.s 1 and 5, Court ought to have allowed the application and issued summons to the Commissioner and the Taluk Surveyor.

7. The learned Counsel for the Respondent has submitted that the Director, National Archives of India was already examined as PW-5 and there is no need to examine the Deputy Surveyor. It was further submitted that when the suit was posted for arguments, application was filed to examine the Advocate Commissioner only with a view to delay further proceedings and the impugned Order warrants no interference.

8. Order 16 Rule 1 Sub-rule 3 CPC confers discretion on the Court to permit a party to summon through Court or otherwise, any witness, other than those whose names appear in the list submitted in Sub rule (1) if such party shows sufficient cause for the omission to mention the name of such witness in the list. Order 16 Rule 1A enables the party to bring any witnesses to give evidence or to produce the documents. But this enabling provision is subject to the provision contained in Sub-rule (3) of Rule (1) of Order 16.

9. The trial Court has dismissed the application mainly on the ground that the Plaintiff has not included the list of witnesses at the earlier stage. The witnesses sought to be examined are Advocate Commissioner and others. The mere fact that name of a witness was not stated in the earlier list does not mean that he should never be allowed to be examined. Under Order 16 Rule 1(3) CPC, for reasons to be recorded, the Court can permit any witness, not mentioned in the list to be examined.

10. A party is entitled to seek issuance of summons to a Government employee or an Advocate Commissioner. However a party seeking issuance of summons to a witness must clearly state the purpose for which the witness is sought to be examined. In 2000 (3) MLJ 7 [Sri Aurobindo Ashram Trust, Pondicherry rep. by its Managing Trustee and Anr.], this Court has held as "..., the legal position is that a party who seeks for a prayer to the Court to issue summons to a witness, must reveal to the Court the purpose for which the witness is proposed to be summoned. Once such an application is filed, it is for the Court to use its discretion and to decide whether summons are to be issued to those witnesses. It has to be pointed out that the issue of summons is not automatic and in appropriate cases or in cases where the objections are raised, the bonafides of the request has to be looked into and appropriate orders passed".

11. The mere fact that the Plaintiff has not included the name of the Advocate Commissioner in the list of witnesses cannot take away the Plaintiff's right to seek issuance of summons to the witnesses not included in the list.

12. Let us consider whether in the facts and circumstances of the case, examination of Commissioner is warranted. Under Order 26 Rule 10(2), "report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record". The Court or any of the parties to the suit with the permission of the Court, may examine the Commissioner personally, touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation.

13. Since report of the Commissioner shall be evidence in the suit, it is subject to all the checks to which any other item of evidence is subject to law. If a request is made for the examination of the Commissioner, Court has to consider whether there is any real ground for examining the Commissioner. If there is no reasonable ground for examining the Commissioner, the Court has discretion to disallow it. If there is any objection to any of the matters mentioned in the Commissioner's Report, the Commissioner may be examined and required information may be elicited and if this is not done, the reliance of the Commissioner's report as evidence, cannot be objected at a later stage. Protection is afforded to the Advocate Commissioner so that the Commissioner, who is an Advocate, may not be subjected to vexatious examination by either of the parties. But the permission to examine the Commissioner should not be withheld arbitrarily. The necessity for examination of Commissioner and whether to grant permission to examine Commissioner or not must be considered on facts and circumstances of each case.

14. In the present case, Plaintiff has filed elaborate memo of objections to the report of the Advocate Commissioner. In the memo of objections, it is inter-alia stated that Plaintiff has requested the Commissioner to measure the suit property as per cadastre plan and measurement by European feet, since measurements in the Plaintiff's Title Deeds are by European feet. The Plaintiff has also raised various other objections. In view of objections taken to the matters referred in the Commissioner's Report to elicit relevant aspects the lower Court ought to have allowed examination of the Commissioner. There is no proper exercise of discretion in declining to grant permission to examine the Commissioner.

15. So far as the surveyor is concerned, it may not be necessary to issue summons to the surveyor. Since already, the Director, National Archives of India was examined as PW-5 and details regarding the measurements was brought out through him.

16. The learned Counsel for the Petitioner has submitted that Surveyor has accompanied the Commissioner and hence Surveyor is also necessarily to be examined. Whatever be the observation of the Surveyor, the Commissioner

would be in a position to speak before the Court. In that view of the matter, issuance of summons and examination of Surveyor is not necessary.

17. Since memo of objections was filed by the Plaintiff, the Plaintiff ought to be permitted to examine the Commissioner and the CRP is to be allowed to that limited extent.

18. In the result, the Revision Petition is partly allowed. No costs. The application in I.A. No. 1618/2001 is partly allowed to the limited extent of examining Mr. Maruthapandi, Advocate Commissioner in O.S. No. 148/1997.

19. The trial Court is directed to expedite further proceedings and dispose of the suit expeditiously in accordance with law.