
(1999) 02 MAD CK 0120
In the Madras High Court

L. Manoharan and Others

APPELLANT

Vs

A. Ramathilagam and Another

RESPONDENT

Date of Decision : 02-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : (1999) 2 MLJ 526

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Judgement

A. Ramamurthi, J.—The defendants in O.S. No. 208 of 1991 on the file of District Munsif's Court, Madurai Taluk, have preferred the

revision aggrieved against the order of dismissal in I.A. No. 24 of 1998, dated 25.9.1998.

2. The petitioners/defendants filed a petition under Order 26, Rule 9 of the Code of Civil Procedure, for appointment of a Commissioner for local

inspection preferably by the previous Commissioner, directing him to identify and locate the properties purchased by the plaintiffs and the

defendants in survey No. 401/1 after fixing the boundaries and also to locate the disputed property with reference to the sale deeds of both parties

and to note the other things that may be pointed out by the parties at the time of inspection and to submit a report with plan.

3. The respondents/plaintiffs opposed the application, and after hearing both sides, the lower court dismissed the petition and aggrieved against

this, the present revision is filed.

4. The learned Counsel for the petitioners/defendants contended that the court below was not justified in dismissing the commission petition. The

appointment of a Commissioner is essential to determine and resolve the controversy in the suit. The dismissal of the petition on the ground that no description of property is given is incorrect. The trial court also failed to note that the commission warrant issued on previous occasion could not be executed due to reasons beyond control of the parties and the learned Commissioner himself has stated that the entire suit property and the adjacent property are full of rain water and there is difficulty in locating the survey stones.

5. Heard the learned Counsel on either side.

6. The petitioners/defendants filed a petition under Order 26, Rule 9 of the Code of Civil Procedure, for appointment of a Commissioner. The

respondents/plaintiffs opposed the application on the ground that already on their application, a Commissioner was appointed in I.A. No. 474 of

1992 and a report was also filed. Subsequently, the respondents filed I.A. No. 390 of 1994 for re-issue of the commission warrant to measure the

property and that was also carried out. The petitioners filed I.A. No. 158 of 1995 for an appointment of a Commissioner and the Commissioner

inspected the property and submitted a report. The main objection put forward by the respondents is that number of applications are filed by the

petitioners only to protract the litigation and the Commissioner cannot be appointed to locate or identify the disputed property.

7. The respondents/plaintiffs filed a suit for declaration that the suit property belongs to them absolutely and also they are seeking recovery of

vacant possession after removal of the superstructure. The suit was filed in the year 1991. No doubt, a Commissioner was already appointed in

this case on the application filed by the respondents and report was also filed. Again an interim report was also filed by the Commissioner in I.A.

No. 158 of 1995. Subsequently, I.A. No. 158 of 1995 was closed by the trial court on the ground that the Commissioner has returned the warrant

stating that in view of the prevailing situation, the work could not be carried out. It is necessary to state that the petitioners preferred C.R.P. No.

3547 of 1997 against the orders of closing the commission application and this Court by an order dated 9.1.1998, dismissed the civil revision

petition with an observation that if the parties desire and if they make out a case, it is always open to them to seek further direction from the trial

court.

8. The petitioners filed I.A. No. 24 of 1998 thereafter, only for an appointment of the Commissioner for the aforesaid purpose, The trial court

dismissed the application on two grounds viz., that the description of property is not given in the petition and again the appointment of a

Commissioner cannot be made for locating or identifying the property. No doubt, the Commissioner had inspected the property on more than one

occasion, But the last application filed by the petitioners was closed by the trial court on the ground that there was full of water and the property

cannot be measured and survey stones also cannot be located. It is only under such circumstances, the earlier petition was closed and even though

the revision filed by the petitioners was dismissed, liberty was given to them to file a fresh application, if necessary. The petitioners have made use

of the same and filed I.A. No. 24 of 1998.

9. When number of applications were already filed, the dismissal of I.A. No. 24 of 1998 on a technical ground that the description of property has

not been incorporated in the petition is not correct. The survey number is mentioned in the petition itself and, moreover, the inspection by the

previous Commissioner has also been sought by the petitioners. So far as the second objection is concerned, it is not proper to dismiss the

application on this ground. In fact, the earlier application I.A. No. 158 of 1995 itself was filed for a similar purpose and that was allowed, but

because of reasons beyond control, the petition was closed. When there is dispute relating to the parties with reference to identity and location, it is

just and necessary that the Commissioner be directed to measure the property with the help of a qualified surveyor and also find out the area of

dispute, so that much of oral evidence can be reduced. The petitioners are not at fault for the closure of I.A. No. 158 of 1995 and under the

circumstance, considering the dispute involved in the case, it is just and necessary that the same Commissioner can be appointed for local

inspection, directing him to carry out the object mentioned in I.A. No. 24 of 1998. By allowing this application, no prejudice will be caused to the

respondents, but irrespective of the result of the suit, the entire expenses has to be met only by the petitioners.

10. For the reasons stated above, the revision petition is allowed and the order

passed by the trial court in I.A. No. 24 of 1998 is set aside and the petition is allowed. The trial court is directed to appoint the same Commissioner for local inspection and to note the other features as pointed out in the petition with the help of a qualified surveyor. The expenses payable to the Commissioner has to be exclusively met by the petitioners irrespective of the result of the case. The Commissioner is also directed to complete the entire work within a period of three months from the date of receipt of the warrant and both parties are directed to co-operate with the Commissioner in executing the warrant. No costs. Consequently. C.M.P. No. 19283 of 1998 is closed. The trial court is directed to expedite the trial of the case in a period of four months.