

**(1933) 12 MAD CK 0016**  
**In the Madras High Court**

|                                                                                             |            |
|---------------------------------------------------------------------------------------------|------------|
| Modalavalasam Latchan Naidu and Another                                                     | APPELLANT  |
| Vs                                                                                          |            |
| Raja Saheb Maherban Dostan Raja Sri Rao Sweeta Chalapathi<br>Rama Krishna Ranga Rao Bahadur | RESPONDENT |

---

**Date of Decision :** 15-12-1933

**Acts Referred:**

**Citation :** 151 Ind. Cas. 941

**Hon'ble Judges :** Cornish, J

**Bench :** Single Bench

---

**Judgement**

Judgment.

1. The petitioners are defendants in a suit for the removal of a bund which he is alleged to have wrongfully raised so as to divert water flowing into the plaintiff's tank. The plaint was filed on July 22, 1932, and with it a petition for the appointment of a Commissioner to inspect the locality and to make a plan. Notice was ordered to go to the defendants and was made returnable on August 23, 1932. The notice was actually served on defendants on August 17, 1932.

2. In the meanwhile on July 29, 1932, a week after the first petition, the plaintiff put in another petition for the issue of a commission emergency, alleging that if the Court should pass orders after service of notice on the defendants it would cause delay; and that owing to the changes made by the rainfall the defendants would get the opportunity of including a certain channel in their lands.

3. The Court granted the petition and issued a warrant to the Commissioner returnable on August 3, 1932. The Commissioner completed his inspection on July 31, 1932, and signed his report on August 22, 1932. No notice was given to defendants of this second petition, nor was any notice given to them of the issue of the Commissioner nor had they any opportunity afforded to them of being present when the Commissioner made his inspection. The whole thing was done behind their back. It must be remembered that Rule 10 (2) of Order XXVI, Civil Procedure Code, makes the report of the Commissioner evidence in the suit.

Therefore, it is of importance that the report should not be founded on representation made to the Commissioner or on matters brought to his notice by one party to the suit alone. Indeed, it is so manifestly improper that one party to a suit should be given a commission and the advantage of a report by the Commissioner without the knowledge of the opposite party that I think this alone would be sufficient to justify the interference of a revision Court. But there is Rule 18 of Order XXVI which says that when a commission is issued under this order the Court shall direct that the parties shall appear before the Commissioner in person or by their agents or Pleaders. Sub-rule 2 of Rule 18 says that where all or any of the parties do not so appear the, Commissioner may proceed in their absence. Rule 18 is mandatory, and is intended to ensure that the parties have notice of the appointment of the Commissioner and that they must attend his investigation. There is no power in the Court to issue an ex parte commission. It has been suggested that an emergency excused the order of the District Munsif I think that there was no more emergency on July 29, than there was on July 22, when the first petition was filed; but an emergency could not absolve the District Munsif from complying with Rule 18.

4. A point has been raised by Mr. Govinda-rajachari that the revision petition was filed more than 90 days from the date of the District Munsif's order dated July 29, 1932, though it was filed within that period from the date of the order made by the Munsif on the objections filed by the defendants to the validity of the Commissioner's report.

5. He argued that the order of July 29, was a final order against which the respondents could and should have brought a revision petition within the 90 days prescribed by Rule 41-A of the Appellate Side Rules. But Rule 41-A does not lay down an absolute bar of limitation. Delay may be excused by the Court; and I think it would be a good ground for excusing the delay that the defendant took the very proper course of endeavouring by his objection to the Commissioner's report to get the Munsif to revise his order. Apart from any question of excusable delay, I think that it was open to the defendant to bring his revision petition against the order of the Munsif confirming, after objection, the validity of his order issuing the commission.

6. The revision petition is allowed with costs throughout. The Munsif's order of July 29, will be set aside, with the result that the Commissioner's plan and report fall with it.