PARASURAMA UDAYAN v. THIRUMAL ROW SAHIB.

SADASIVA AYYAR, J.

(1) that it be declared that the plaint lands belong to the temple and are held by defendants Nos. 4 and 5 as archakas of the temple, and

(2) that the permanent lease granted in favour of the father of the defendants Nos. 1 to 3 is not binding on the temple.

The parties will bear their respective costs throughout.

NAPIER, J.

NAPIER, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1921, January 27.

SABAPATHY PATHAN (PLAINTIFF) APPELLANT,

v.

PERUMAL PADAYACHI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9, and O. XVIII, r. 18—Commission for local investigation—Personal inspection by Judge—Old Code (Act XIV of 1882), sec. 392—Alteration in language, effect of.

Under Order XXVI, rule 9, read with Order XVIII, rule 18, of the Civil Procedure Code, a Judge has power to make a local investigation in person in any case in which he sees fit to do so or he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person.

The Privy Council in *Kessowji Issur* v. *G.I.P. Railway Company*, (1907) I.L.R., 31 Bom., 381 (P.C.), does not lay down that Judges should under no circumstances hold an inspection of the site in dispute but only objects to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial.

SECOND APPEAL against the decree of A. NARAYANA PANTULU Garu, Subordinate Judge of Māyavaram, in Appeal Suit No. 16 of 1919, preferred against the decree of GURURAJA RAO, District Munsif of Māyavaram, in Original Suit No. 221 of 1916.

This Second Appeal arises out of a suit for a declaration that the suit site belonged to the plaintiff, and for an injunction restraining the defendants from entering upon the site or opening a window in his wall so as to affect the plaintiff's right to privacy.

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* Second Appeal No. 1111 of 1920.

The District Munsif found the title to and possession of the site in favour of the plaintiff and passed a decree for a declaration and an injunction against the defendants. The District Munsif had appointed a commissioner to make a local investigation and to report on the results of his investigation. The defendants preferred an Appeal and the lower Appellate Court admitted in evidence certain paimash registers tendered by the defendants only before that Court; and the Subordinate Judge who heard the Appeal made a personal inspection of the place and came to the conclusion that the defendants were the owners of the disputed site and, reversing the decree, dismissed the suit. The Subordinate Judge observed, as to his local inspection as follows .

"I inspected the site in dispute and I have no doubt that the site belongs to the shops (of the defendants) and not to the plaintiff. There was no necessity for me to examine anybody present at the time of inspection by me and to note the points observed there, because all the points required were already noted by the Commissioner in his report."

The plaintiff preferred this Second Appeal.

S. Muttayya Mudaliyar for appellant.

K. Bashyam Ayyangar for respondents.

The Court delivered the following JUDGMENT:—

We are not satisfied that the learned Subordinate Judge acted irregularly either in admitting additional evidence in appeal or in inspecting the site. The Judge gave substantial reasons for admitting additional evidence in the shape of public records.

Rai Kishori Ghose v. *Kumudini Kanta Ghose*(1), *Avant Lal Sahu* v. *Gokul Sahu*(2) and *Dawarka Prasad* v. *Makhu Lal*(3) have been quoted in support of the argument that it is illegal for a Court in person to hold a local inquiry.

The two latter are judgments of single Judges and in all these cases the decisions are based on the omission from Order XXVI, rule 9, of the Code of Civil Procedure, of the words that occurred in section 392 of the Old Code, which provided for the issue of a commission for a local investigation only in cases where it could not be conveniently conducted by the Judge in

(1) (1912) 14 I.C., 377. (2) (1916) 35 I.C., 344.
(3) (1918) 52 I.C., 241.

SABAPATHY PATHAN v. PERUMAL PADAYACHI.

person. Two of the learned Judges relied also on the English practice in such matters. In India we must be guided by our own Civil Procedure Code on matters of procedure which are specifically provided for.

There is also a case of this Court, *Syed Ahamad Sahib* v. *The Magnesite Syndicate, Ltd.* (1), which proceeds on the assumption that the change of language in Order XXVI, rule 9, signified a prohibition of inspections being conducted by Judges in person.

We do not think that it has that significance.

The effect of the alteration in the language seems only to be that the issue of commissions is not restricted to cases where the Judge is unable conveniently to make the investigation himself. As the rule now stands, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience.

In none of the above decisions has any account been taken of the newly enacted provision in Order XVIII, rule 18, which declares:

"The Court may at any stage of a suit inspect any property or thing concerning which any question may arise."

This rule suggests that the legislature desired to encourage rather than to prohibit the elucidation of the truth by means of personal inspections made by Judges.

The Privy Council decision, *Kessowji Issur* v. *G.I.P. Railway Company* (2) has very often been quoted as meaning that Judges should under no circumstances hold an inspection of the site in dispute, but if the decision is carefully studied it appears that the objection to the procedure adopted in that case was mainly to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial.

In the present case no such objection can be advanced. The use made by the learned Judge of what he observed at his inspection was to verify and confirm what the commissioner had already noted in his report. By so doing it cannot be urged that either side was prejudiced.

The Second Appeal fails and is dismissed with costs.

K.R.

(1) (1915) 28 M.L.J., 598. (2) (1907) I.L.R., 31 Bom., 331 (P.C.).