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S.A. No.311 c



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.09.2025

CORAM :

THE HON'BLE MR. JUSTICE K. RAJASEKAR

S.A. No.311 of 2019

Dhanalakshmi

... Appellant/ Respondent/ Plaintiff

Vs.

Vennila

... Respondent/ Appellant/ Defendant

Prayer: This Second Appeal is filed Under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 20.11.2018 made in A.S.No.1 of 2015 on the file of the I Additional District Court at Tindivanam, Villupuram District, reversing the Judgment and Decree dated 31.10.2014 made in O.S.No.15 of 2011 on the file of the Principal Sub Court at Tindivanam, Villupuram District.

For Appellant : Mr. P.R. Bala Subramanian

For Respondent : No Appearance



JUDGMENT

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This appeal filed by the plaintiff challenging the judgment and decree dated 20.11.2018 made in A.S.No.1 of 2015 by the I Additional District Judge, Tindivanam, whereby reversed the Judgment and Decree dated 31.10.2014 made in O.S.No.15 of 2011 by the Principal Sub Judge, Tindivanam, and dismissed the suit filed by the plaintiff/ appellant herein.

2. The case of the plaintiff is that, the plaintiff/ appellant herein is the owner of the suit schedule property of 19 cents out of 1.43 acres of land situated in Survey No.69/1, New Survey No.57/1N1 and it was allotted to her by way of a compromise decree dated 12.07.2000 passed in a suit for partition, filed by the family members in O.S.No.86 of 2000 on the file of the Principal Sub Court, Tindivanam. Based on that allotment, she was in possession and enjoyment of the property. Subsequently, the adjacent lands of the suit property were acquired by the National Highways. On 07.12.2010, the defendant/ respondent herein has attempted to remove the cattle shed put up by the plaintiff in her land, which was resisted by her and thereafter, she filed the suit for declaration and consequent injunction.

3. The defendant filed written statement stating that, originally the



suit schedule property in Survey No.64/1 belongs to one Govindasamy and his family members and by way of a sale deed dated 11.05.2005, the defendant has purchased the properties including the suit property to the extent of 19.5 cents. From the date of purchase, the defendant was in possession and enjoyment of the suit property continuously without any interruption. Since some of the portions of the land were acquired by the National Highways, the defendant's land came near to the Highway and the value of her land increased. Further, the plaintiff approached the defendant with offer to purchase the suit property and since the same was refused, the plaintiff filed a suit with false allegations, as if the defendant tried to encroach the property of the plaintiff and prays to dismiss the suit.

4. The Trial Court after considering the pleadings of both sides framed following issues.

1. *Whether the plaintiff is entitled for declaration of her title over the suit property?*
2. *Whether the plaintiff is entitled for permanent injunction as prayed for?*
3. *To what other relief if any the plaintiff is entitled for?*

5. Before the Trial Court, the plaintiff examined herself as P.W.1 and one Balasundaram, who is the father of the plaintiff was examined as



P.W.2 and Exs.P.1 to P.8 were marked. On the side of the defendant, the defendant examined herself as D.W.1 and one Arul was examined as D.W.2 and Exs.D.1 to D.5 were marked.

6. The Trial Court after considering the evidence placed on record concluded that the lands purchased by the defendant were already acquired and the plaintiff had established her title and also her possession. The Trial Court has also further held that the defendant is unable to establish their possession over the suit property and further the Advocate Commissioner's report dated 27.08.2011 was also relied on by the Trial Court for identification of the properties to the extent that, the properties described in the sale deed of the defendant was already acquired by the National Highways.

7. Challenging the judgement and decree of the Trial Court, the defendant has filed an appeal in A.S.No.01 of 2015 before the I Additional District Court, Tindivanam. The lower Appellate Court after considering the arguments made on both sides, exhibits marked and the Advocate Commissioner's report and also after interpreting Ex.A.1 made an observation that, the plaintiff has failed to prove that the land of the defendant was acquired, thereby set aside the judgment and decree of the Trial Court, consequently dismissed the suit.



8. Aggrieved over the same, the plaintiff had preferred this appeal and this Court while admitting this appeal had framed the following substantial questions of law:

- 1. Whether the Lower Appellate Court is right in misplacing the burden when the plaintiff has proved her case as contemplated under Section 101 of the Indian Evidence Act, 1872?*
- 2. Whether the Lower Appellate Court below is right in upholding the right and title of the defendant over the suit properties without having the proof of title, possession of the same?*
- 3. Whether the Lower Appellate court is right in saying that the Trial Court has no power to consider the unmarked report of the Advocate Commissioner?*

9. The learned counsel for the appellant submitted that already this Court by an order dated 12.09.2012 passed in C.R.P.No.3159 of 2012 has nullified the report of the learned Advocate Commissioner and held that the properties are identifiable, hence the Advocate Commissioner's report relied on by the lower Appellate Court is not sustainable. Further, there is no evidence on the side of the defendant to show that the property purchased by the defendant is the suit property. By marking the Land Acquisition Notice (Ex.B.5), the defendant has agreed that her property was acquired, hence there is no reason in holding that the plaintiff have failed to prove the land



acquisition, which is not sustainable, thereby prays to dismiss the judgment and decree of the lower Appellate Court and confirm the judgment and decree of the Trial Court.

10. The notice to the respondent also served on the defendant and the name of the defendant is also printed in the causelist, but there is no representation on behalf of the respondent/ defendant.

11. I have considered the submissions made by the learned counsel for the appellant and gone through the materials available on record.

12. On perusal of the compromise decree passed in O.S.No.86 of 2000 dated 12.07.2000, it reveals that the property described in Survey No.69/1 in Molasur Village, Tindivanam Taluk to the extent of 1.43 acres by describing the following boundaries.

எம். தனலட்சுமி 10-ம் பிரதிவாதி அடைய வேண்டிய சொத்து விபரம்.

அயிட்டம் 1:-

திண்டிவனம் வட்டம், மோளசூர் அயன் புஞ்சை சர்வே 68/3
ஏக்கர் 2.68, 68/4 ஏக்கர் 2.68 ஆக 5.36

அயிட்டம் 2:-

திண்டிவனம் வட்டம் மோளசூர் அயன் புஞ்சை சர்வே 69/1 ஏக்கர்
5.5 தங்கள் நிலத்திற்கு தெற்கு பார்த்த சாரதி நிலத்துக்கு வடக்கு,



எங்கள் நிலத்திற்கு மேற்கு, பார்த்தசாரதி நாயடு குப்பன் இவர்கள் நிலத்திற்கு கிழக்கு இதன் மத்தியில் ஏக்கர் 1.43 இந்த சொத்து மொளதூர் ஊராட்சி எல்லைக்குட்பட்டது. மரக்கானம் பஞ்சாயத்து யூனியனைச் சார்ந்தது.

13. The plaint has been filed by seeking relief of 19 cents of land out of 1.43 acres allotted to the plaintiff herein. In the plaint schedule, the following boundaries were given.

திண்டிவனம் வட்டம், மொளதூர் அயன் புஞ்சை சர்வே 69/1 ல் ஏக்கர் 5.54 ல் 1.43 ல் 0.19 செண்ட். இதற்கு ஜக்குபந்தி ரோட்டிற்கு கிழக்கு, வாதி தனலட்சுமி புஞ்சைக்கு வடக்கு, தெற்கு, மேற்கு. இதன் மத்தியில் 0.19 செண்ட் விஸ்தீர்ணம். இதன் புதிய சர்வே எண்.54/IN1, இதன் பட்டா எண்.630, இதன் மதிப்பு ரூ.1,03,000/-

14. The issue involving in this case is whether the 19 cents of land mentioned in the suit schedule property was purchased by the defendant prior to allotment to the plaintiff or without any title to the plaintiff's family.

15. On perusal of the Trial Court judgment, it reveals that by marking various sale deeds and also the compromise decree, it has been established by the plaintiff that she was allotted with 19 cents out of 1.43 acres of land in



Survey No.69/1, whereas in the plaint, it has been stated that Survey number of the 19 cents of land have been re-numbered as Survey No.57/1N1 and the patta was also issued to that effect. The entire issue has been decided based on the title claimed by the defendant, but she had failed to prove her case, whereas it is the plaintiff has to prove her case by showing proper identity of the land for which she claims declaration of title.

16. Admittedly, there is no information regarding the survey number of the properties placed before the Trial Court and the specific case of the plaintiff is that, the lands purchased by the defendant and her ancestors were already acquired. Whereas on perusal of the documents produced, except the notice issued for land acquisition, no other documents have been filed before the Trial Court and even the plaintiff has not able to establish, whether which portion and extent of the land purchased by the defendant has been acquired. However, the lower Appellate Court has accepted the case of the defendant on the basis of the Advocate Commissioner's report and after considering the fact that the plaintiff has failed to establish and identify the lands, which were acquired.

17. On careful perusal of the records, it reveals that for identification of the property, which is made in the plaint, the rough sketch correlating the



survey number of the present land was not filed before the Trial Court. Further the evidences adduced have not shown the proper identification of the property. Hence, I am of the view this has to be properly considered by the lower Appellate Court. Further, this Court in C.R.P.No.3159 of 2012 dated 12.09.2012 has not nullified or quashed the Advocate Commissioner's report and it has only considered the point that, whether the Trial Court has to re-constitute the Advocate Commissioner for the purpose of considering the objections raised by the plaintiff/ appellant herein, this Court has only recorded that there is no dispute regarding the identification of the property. That being the case, the order passed by this Court in C.R.P.No.2152 of 2012 dated 12.09.2012 is not helpful to the plaintiff and this Court has not quashed the Advocate Commissioner's report.

18. The Apex Court in *M Siddiq (D) Thr Lrs. vs. Mahant Suresh Das & Ors., [2020 (1) SCC 1]*, has held that the evidence of the Advocate Commissioner form part of the record and reiterated the procedures to be followed, once the Court has decided to appoint an Advocate Commissioner, which it considers to be requisite or proper for the purpose of a local investigation to obtain any opinion or elucidating any matter in dispute, in paragraph Nos.474 to 479 as follows:



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“474. For the present purpose, the court has to deal with Rules 9, 10, 10A and 10B. Rule 9 empowers the court to issue a commission for the purpose of a local investigation which it considers to be requisite or proper for the purpose of elucidating any matter in dispute. After a local inspection, Rule 10 empowers the commissioner, to submit a signed report to the Court together with the evidence. Rule 10 provides as follows: -10 . Procedure of Commissioner— (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court. (2) Report and deposition to be evidence in suit. The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to suit may examine the Commissioner personally in open Court touching any part 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. (3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.? Rule 10A makes the following provisions in regard to the appointment of a commission for the purposes of scientific investigation: -10A . Commission for scientific investigation— (1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court. (2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9Rule 10B deals with the appointment of a commission for the performance of a ministerial act which cannot be conveniently performed before the court.

475. While directing the ASI to carry out a scientific investigation, the High Court was exercising its powers under Section 75 and Rule 10A of Order XXVI. To such an investigation,



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sub-rule 2 of Rule 10A stipulates that the provisions of Rule 10 shall apply, as far as may be, as they apply in relation to a Commissioner appointed under Rule 9. Rule 10(2) stipulates that the report and the evidence taken by the commissioner -shall be evidence in the suit?. There is a mandate of the statute that the report and the evidence be treated as evidence in the suit and that it -shall form part of the record?. However, either the court on its own accord or any of the parties to the suit (with the permission of the court) may examine the Commissioner personally. This is an enabling provision under which the Commissioner can be examined either by the court on its own accord or at the behest of a party to the suit. The subject matter on which the Commissioner can be examined is also described in sub-rule 2 of Rule 10. The Commissioner may be examined on: (i) Any of the matters referred; (ii) Any of the matters mentioned in the report; (iii) As to the report; or (iv) As to the manner in which the investigation has been made. This covers both matters of procedure followed in conducting the investigation and the substantive aspects of the report.

476. Dr Bhuvan Vikram Singh During the course of the proceedings before the High Court, the plaintiffs in Suit 5 filed an application requesting the examination of Dr Bhuvan Vikram Singh, who was part of the excavation team. The High Court summoned the witness. Dr Bhuvan Vikram Singh filed an application²⁷⁸ requesting that he may be summoned as a court's witness as he was part of the court appointed excavation team and was not willing to depose as a witness of any party to the suit. The counsel for the plaintiffs in Suit 5 did not oppose the application and made a statement that he did not wish to examine Dr Bhuvan Vikram Singh as a witness in Suit 5. However, the counsel made a request that Dr Bhuvan Vikram Singh should be treated and examined as a court's witness. By an order dated 4 December 2006, the High Court discharged the witness without recording his deposition, while observing that the court itself had the discretion to call any witness and be examined as a court's witness and such a discretion could not be fastened upon the court by an application filed by any party.



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477. Justice Sudhir Agarwal in the course of his judgment noted that parties had raised objections to the report, which were to be decided by the court. But then, it was found that the nature of the objections was such that unless parties were 278 Application no 25(o) of 2006 553 allowed to lead evidence, a decision on the objections could not be taken. Hence, on 3 February 2005, the High Court directed that the ASI report shall be admitted in evidence but the objections that were raised by the parties would be the final hearing of the suits by which time the recording of evidence would be complete. The High Court noted that there is no requirement in the law or in Rules 10 or 10A or Order XXVI that the report cannot be treated as substantive evidence unless the Commissioner is examined as a witness. The High Court observed that none of the parties opted to examine the Commissioner on any matter touching the report. Moreover, the objections filed by them did not place a challenge to the entirety of the report but only to the conclusions drawn in the Summary of results. It appears that allegations of bias and mala fides were also urged before the High Court; however, these were not pressed during the course of the hearing by Ms Arora, learned Senior Counsel, before this Court.

478. There is no dispute about the factual position that none of the parties sought to examine the Commissioner in terms of the provisions contained in Rule 10(2) of Order XXVI which, as seen above, are applicable by virtue of Rule 10A(2) to a Commission constituted for a scientific investigation. Rule 9 of Order XXVI is a substantive power allowing the court to issue a Commission for making a local investigation. Rule 10 is procedural in nature. Rule 10A is substantive, empowering the court to issue a commission for making a scientific investigation. Rule 10A(2) which applies the provisions of Rule 10, in its application to a Commissioner appointed under Rule 9, to a commission for scientific investigation contains the expression -as far as may be. These words 554 comprehend the notion of that which is practicable, and to the extent feasible for the purpose of fulfilling the power which is conferred upon the court to issue or appoint a Commission confers a discretion on the court to either itself examine the Commissioner on matters pertaining to the report or investigation and for enabling parties to request the court to call the Commissioner for examination. Rule 10 does not abrogate the



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right to question the report of a Commissioner if the enabling power of calling the Commissioner for cross-examination is not exercised. A party may avail of that opportunity by seeking the examination of the Commissioner on matters bearing upon the report. A party may also lead evidence of its own witnesses who seek to controvert the methodology or the findings of the Commissioner appointed for conducting a scientific investigation. The right of a party to object to the report of the Commissioner is not abrogated merely because the Commissioner is not called for cross-examination. Much will depend on the nature of the objections which are sought to be urged by a party before the Court though the Commissioner was not called for examination.

479. In the present case, the High Court was of the view that there was no requirement in law for the Commissioner to be called upon to give evidence as a condition precedent to the report being treated as evidence in the suit. The High Court is justified in this view since Rule 10(2) of Order XXVI stipulates that the report of and the evidence taken by the Commissioner -shall be evidence in the suit and shall form part of the record?. Hence, the report was correctly treated as evidence in the suit and as the part of the record. This, however, foreclose any party to the proceedings from questioning the report for which (i) Calling for the examination of the Commissioner in open court; (ii) Leading evidence of its own witnesses to displace the report of the Commissioner; and (iii) Placing its objections to the report of the Commissioner for consideration by the court. The judgment of Justice Agarwal does in fact note that the objections which parties had submitted to the report would be decided after the final hearing of the suits, by which time the evidence would be complete. The entitlement of a party to follow or pursue the courses of action referred to in (ii) and (iii) above was independent of the enabling power conferred by the latter part of Rule 10A(2).”

19. As discussed above, the Advocate Commissioner's report forms part of the evidence and on perusal of the judgment of the Trial Court, it



reveals that the Advocate Commissioner's report has been elaborately considered by the Trial Court. It is true that the report has not been placed on record by marking it, but the Advocate Commissioner's report forms part of the record and it has to be properly considered and the same cannot be discarded or set aside without any valid reason or deferred by way of any judicial order. The Advocate Commissioner's report should be taken on record in order to reach better understanding regarding the identification of the property in this case.

20. Accordingly, I am of the view that the report of the Advocate Commissioner has to be taken on record, if any evidence is required for identification of the property, the same shall also be recorded by examining the Commissioner before the Court. However, considering the fact that the suit was filed in the year 2011, the lower Appellate Court itself can examine the further evidence, including examining the Advocate Commissioner, if required, hence the matter is remanded back to the lower Appellate Court for reconsideration, more particularly to give a specific finding relating to identification of the property and for arriving a conclusion, whether the property purchased by the plaintiff is the suit schedule property and whether the property allotted by the plaintiff was already sold in favour of the defendant's vendor by the plaintiff's ancestor in title.



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K. RAJASEKAR, J.

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21. Accordingly, this Second appeal is allowed by setting aside the judgment and decree dated 20.11.2018 in A.S.No.1 of 2015 on the file of the I Additional District Court at Tindivanam, Villupuram District and the matter is remanded back to the lower Appellate Court for proper consideration of the appeal, more particularly to consider all the evidence rendered by the parties and to decide the case on merits and dispose of the same, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition, if any stands closed.

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Index:Yes/No

Speaking Order : Yes/No

Neutral Citation Case : Yes/No

To:

1. The I Additional District Judge, Tindivanam, Villupuram.
2. The Principal Sub Judge, Tindivanam, Villupuram.
3. The Section Officer,
VR Section, High Court of Madras.



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