



C.M.A.No.172 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 23.11.2023

CORAM:

MR.JUSTICE N.SESHASAYEE

C.M.A.No.172 of 2022
and C.M.P.No.1333 of 2022

Thillainayagam

... Appellant

Vs.

Dhakshnamurthy

... Respondent

PRAYER: This Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree made in A.S.No.11 of 2017 dated 30.08.2019 on the file of the I Additional Subordinate Judge, Cuddalore, setting aside and remanding the well-considered judgment and decree made in O.S.No.642 of 2005 dated 09.08.2016 on the file of the Additional District Munsif, Cuddalore.

For appellant : Ms.J.Deepika
for Mr.D.Ravichander

For respondent : Mr.T.V.Sai Srujan



JUDGMENT

The defendant in O.S.No.642 of 2005 on the file of District Munsif Court, Cuddalore, is the appellant. A suit was laid for declaration of plaintiff's title and for recovery of about 50 sq.ft. from the defendant. The allegation is that the defendant had encroached the said area which belonged to the plaintiff. The defendant resisted the suit and came up with his counter claim, wherein, he alleges that the plaintiff has encroached into certain area belonging to him. The trial Court appointed a Commissioner and he had filed his reports along with a plan. After trial, the Court came to the conclusion that the plaintiff had not discharged his burden and dismissed the suit. So far as defendant's counter claim is concerned, it held that the plaintiff has perfected title over 10 inches each of the defendant's property and after deducting the same, it has granted a decree for the rest of the property, for recovery of which the defendant had sought the counter claim.

2. Aggrieved by the decree, the plaintiff preferred A.S.No.11 of 2017 before I Additional Sub Court, Cuddalore. The defendant however, does not prefer any appeal vis-a-vis the 10 inches of property which according to the trial



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Court that he had lost to the plaintiff by adverse possession. The First Appellate Court would now set aside the decree of the trial Court and remanded the matter for fresh considerations. The line of reasoning of the First Appellate Court is:

- a) that the trial Court has not marked the Commissioner's report.
- b) the description of property as given by the plaintiff in the plaint is factually incorrect. Whereas, the plaintiff's property lies to the south of defendant's property, the description of property in the plaint was given as one lying to the north of defendant's property.

3.This apart, the First Appellate Court has also directed re-issuance of the Commissioner warrant for obtaining certain clarification.

4.Heard Ms.J.Deepika, the learned counsel for the appellant. The respondent / plaintiff is represented by Mr.Sai Srujan, the learned counsel was appointed by the Legal Services Authority to defend the case.

5.Relying on the ratio in *Sirajudheen Vs. Zeenath and Others [(2023) SCC*



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Online SC 196] and Elumalai Vs.Kanthamani Ammal [(2017) (1) CTC

307, the learned counsel submitted that even though Commissioner's report has not been formally marked, the learned District Munsif indeed had relied on the same for arriving at his conclusion. So far as the nature of amendment required to be made is concerned, it is cosmetic, since there is no dispute between the parties that the plaintiff's property lies to the south of defendant's property. If any Commission needs to be appointed, it is well within the powers of the First Appellate Court to appoint a Commissioner.

6.The suit is of the year 2005 and it would be an atrocious strategy if it were to be remanded for making certain cosmetic amendments to the pleadings of the plaintiff. So far as Commissioner's report is concerned, first the learned trial Judge was in error in requiring that it must be formally marked through plaintiff. It is a court record, and it is admissible without any formal proof under Order XXVI Rule 10. At any rate, the learned trial Judge has considered it and therefore the First Appellate Court too was in error in attaching significance to its formal marking.



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7.This Court, therefore, does not consider that there is hardly any ground as to why the appeal must be remanded back to the trial Court.

8.In conclusion, this appeal stands allowed. This Court sets aside the order of remand and remit the matter back to the First Appellate Court. The plaintiff is at liberty to seek a formal amendment to the description of property, more particularly, the boundaries of the property to fit it with reality. The First Appellate Court is now required to mark the Commissioner's report and the plan formally under Order 26 Rule 10 C.P.C., hear the parties and then take a call whether any particular fact is required to be made available by the Commissioner. The First Appellate Court is also directed that in the eventuality of it finding that any specific fact is required to be found by the Commissioner on local inspection, then warrant may be issued to the same Commissioner who had done the work before the Lower Court, unless the learned counsel is either unavailable or unwilling to undertake the responsibility.



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N.SESHASAYEE, J.

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9.The appeal is now required to be disposed of on or before 31.03.2024. No cost. Consequently, the connected miscellaneous petition is closed.

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Index : Yes / No
Neutral Citation

To.

1.I Additional Subordinate Court
Cuddalore

2.The Additional District Munsif
Cuddalore.

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