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S.A.(MD).No.544 of 2017

THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.12.2023

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.544 of 2017

and

C.M.P.(MD)No.11762 of 2017

Kameela (Died)

Sahul Hameed

... Appellant

/Vs./

Puhari

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree, dated 12.09.2017, in A.S.No.48 of 2014 on the file of Learned Sub Ordinate Judge, Devakkottai, confirming the Judgment and Decree, dated 11.09.2014, in O.S.No.22 of 2013 on the file of Learned District Munsif, Devakkottai.

For Appellant : Mr.R.Sundar Srinivasan

For Respondent : No appearance

JUDGMENT

The plaintiff is the appellant herein. The plaintiff has filed the suit for declaration and injunction.

2. The contention of the plaintiff is that the plaintiff's husband has



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purchased the suit property and the measurement of the property is North – South 60 feet and East – West 30 feet, totally 1920 square feet. The plaintiff has put up compound wall enclosing his property on the East, West and South. While putting up the compound wall on the Northern side, the defendant who is having property in T.S.No.36/4 had objected to put up the compound wall. The objection of the defendant is that the plaintiff is encroaching his property and putting up the compound wall.

3. The contention of the plaintiff is that he is putting up the compound wall within his premises for which he is relying on the sale deed executed in her husband's name. The Trial Court has appointed an Advocate Commissioner. However, the plan submitted by the Advocate Commissioner before the Court is not proper because the defendant's property is on the Northern side of the suit property but in the Advocate Commissioner's plan, it is shown in the Southern side. In the final report, the mistake was rectified. However, the measurement was not shown properly. Hence, the plaintiff submitted an application for appointment of Advocate Commissioner again before the Appellate Court in I.A.No.103 of 2015, but the same was dismissed. The First Appellate Court has held that as per Ex-A1, the appellant has purchased the property to the extent of 1920 square feet but this measurement is not available in the Advocate Commissioner's plan.



When the First Appellate Court had rendered a finding that the measurement is not available in the Advocate Commissioner report, then the First Appellate Court has erred in dismissing the I.A.No.103 of 2015.

4. The second appeal is admitted on the following substantial questions of law:

“1. Whether the Trial Court is justified in finding that the appellant is not entitled to declaration in respect of “B” schedule property having ground that the appellant is entitled to “A” schedule property and when the “B” schedule property is part of the very same “A” schedule property?

2. Whether the non-framing of points for determination by the Lower Appellate Court as contemplated under Order 41 Rule 31 CPC which has resulted in miscarriage of justice is law?

3. Whether the dismissal of the application in I.A.No.103 of 2015 by the Lower Appellate Court which is an application for reissuance of commission warrant to the advocate commissioner to clarify the misleading and contradictory statements in his report and plan is proper and sustainable?”

5. The issue between the parties is only on the extent of the property. Further the “B” schedule property is part of “A” schedule property. If the T.S.No. 36/2 belonging to the plaintiff and T.S.No.36/4 belonging to the defendant is measured, the issue between the parties could be resolved. Admittedly the



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advocate commissioner report on the face of it is erroneous, hence the plaintiff had filed I.A.No.103 of 2015 for reissuance of commission. The First Appellate Court had erred in dismissing the application. Further the First Appellate Court has not formulated the points for consideration thereby erred. Therefore, this Court is inclined to allow the Second Appeal and remit the matter back to the First Appellate Court. For the reasons stated supra all the substantial questions of law is answered in favour of the plaintiff / appellant.

6. The First Appellate Court shall appoint an Advocate Commissioner to survey the property especially to measure the property belonging to the plaintiff and the defendant as per their sale deeds and submit a report. Thereafter, based on the report, the First Appellate Court shall pass judgment. Hence, the Judgment and Decree rendered by both the Courts are set aside and the case is remitted back to the First Appellate Court.

7. With the above said observation, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

20.12.2023

Index : Yes / No
NCC : Yes / No
Tmg



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TO:

1. Sub Ordinate Judge, Devakkottai.
2. District Munsif, Devakkottai.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
S.A.(MD)No.544 of 2017

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