

S.A.No. 527 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 22.11.2024

CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No.527 of 2014
and M.P.Nos.1 of 2014

1. Selladurai
2. Palani

... Appellants/ Defendants

Vs.

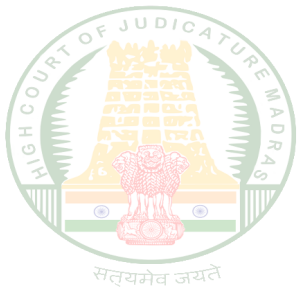
Veera Gounder (died)
1. Thangammal
2. Ramasamy

... Respondents/ Plaintiffs

(Cause title accepted vide order of the Court dated 25.04.2014 made in M.P.No.1/2014 in S.A.Sr.No.13095/2014)

Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, against judgment and decree in A.S.No.136 of 2002 dated 29.10.2003 on the file of the District Judge, Perambalur confirming the judgment and decree in O.S.No.99/1993 dated 27.10.1995 on the file of the District Munsif, Perambalur.

For Appellants : Mr.S.Kamadevan
For Respondents : Mr.P.Gunaraj



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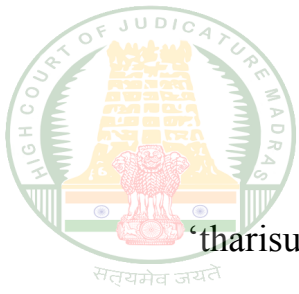
JUDGMENT

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The appellants are defendants 1 and 2, and they have preferred a second appeal against the sole plaintiff. The deceased 1st plaintiff filed the suit for declaration and recovery of possession with alternative relief of preliminary decree for partition for allotting 40 cents on the eastern side with a half share in the Well in the suit property. The suit filed by the deceased 1st plaintiff has been dismissed in respect of the relief of declaration, but a preliminary decree has been granted for partition in respect of 40 cents on the eastern side. The 1st appeal preferred by the defendants also got dismissed by confirming the judgment of the Trial Court.

2. The facts pleaded by the plaintiffs in the plaint in brief:

The suit property in S.F.Nos. 363/1 and 363/4 corresponding to old S.F.Nos. 606/1 and 606/4 measuring an extent of 1 acre, 38 cents and 88 cents, respectively, belonged to the deceased 1st plaintiff's brother Chinnaiya Gounder by virtue of a registered sale deed dated 01.04.1954. At that point of time, the family was a joint family. The deceased 1st plaintiff's brother intended to purchase the eastern side of 40 cents in S.F.No. 606/1 out of 1 acre 38 cents that has been mistakenly described in the title deeds as

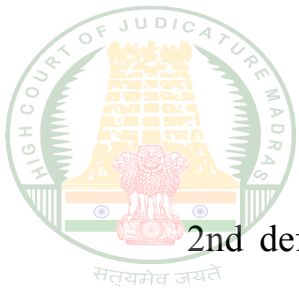


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‘tharisu’. Actually, the property intended to be purchased by the plaintiff’s brother was situated on the west of ‘tharisu’. The boundaries have been wrongly stated as ‘Ganapathy Udaiyar’s land’. Because it has to be described as east of remaining land in S.F. No. 606/1. However, the plaintiff’s family took possession of only the eastern side of 40 cents in S.F. No. 606/1. There was a partition between the plaintiff and his brother on 25.09.1978, and in which the plaintiff was allotted with 40 cents on the eastern side. So the plaintiff is entitled to the eastern 40 cents.

2.1. The remaining 98 cents belonged to one Chellamuthu Gounder and his brothers, who sold the same to Ramasamy on 09.01.1974. Even though the boundaries of the sale deed dated 09.01.1974 do not actually represent 98 cents alone, the said Ramasamy took possession of 98 cents on the western side and was in enjoyment of the same. In the year 1979, both Ramasamy and the deceased 1st plaintiff jointly contributed the expenses to dig a common Well on the eastern portion of S.F. No. 606/1. Subsequently, Ramasamy sold his property to the 1st defendant when he was a minor through his father who is the 2nd defendant. But the 2nd defendant informed the plaintiff as though he had purchased ½ share in the Well in the remaining land in S.F.No.606/1 on the western side. Ramasamy, in collusion with the



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2nd defendant, had executed a deed purported to convey the entire Well.

WEB COPY Ramasamy has got no right to convey the entire Well and he has got only a half share in it. Hence the suit for declaration and the recovery of possession has been filed by the 1st plaintiff, Veera Gounder.

3. The averments made in the written statement filed by the 1st defendant and adopted by the 2nd defendant in brief:

The entire extent of 1 acre 98 cents on the northern side and 40 cents on S.F.No.606/1 belonged to Karrupan S/o Chellan. They got their respective portions in the oral partition deed which took place 50 years ago between Karrupan and Mottaiyan, who is the father of the 2nd defendant, and Vaiyapuri. Due to partition, the younger brother Vaiyapuri had been in exclusive possession and enjoyment of 98 cents and subsequently, he died intestate. The sons of Vaiyapuri viz, Chellamuthu Vagayara had sold 98 Cents in favour of one Ramasamy Gounder. The said Ramasamy Gounder alone had dug the Well in the property. The said property has been purchased by the second defendant on behalf of the first defendant as he was minor then. The Well in the property has been given with electricity connection and electrical motor. So, the southern side of 98 Cents of the larger extent of 1 Acre 38 Cents belonged to the first defendant. The second



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defendant is son of one Mottaiyan and the first defendant is the son of second defendant. So, it is not correct to state that the plaintiff along with Ramasamy Gounder had jointly dug the Well and that the plaintiff is entitled to $\frac{1}{2}$ share in the Well and 40 cents of the eastern side of larger extent of 1 Acre 38 Cents. The suit in O.S.No.99 of 1993 was filed for declaration of plaintiff's title to 40 cents with $\frac{1}{2}$ share in the Well in S.No.606/1 and for permanent injunction.

4. On the basis of the above pleadings, the trial Court has framed the following issues:

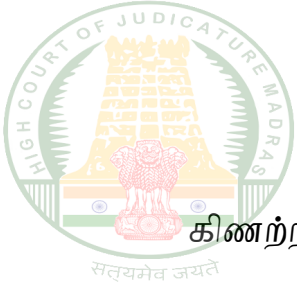
1. வழக்கு சொத்தாகிய பழைய சர்வே எண் 606/1 (புதிய சர்வே எண்,363/1) மொத்த விஸ்தீர்ணம் 1.38 சென்டில் கீழ்புறம் 40 சென்ட் வாதிக்கு பாத்தியப்பட்ட சொத்தா ?

2. தாவாவில் குறிப்பிடும் கிணற்றில் வாதிக்கு பாதி பாத்தியம் உள்ளதா ?

3.வழக்கு மொத்த சொத்து 1.38 சென்ட்டில் கீழ்புறம் 40 சென்ட் வாதியின் அனுபவத்தில் உள்ளதா ?

4. தாவாவில் குறிப்பிடும் கிணற்றில் பாதி உரிமைக்கு ஐஷ கிணறு வாதியின் உபயோகத்தில் உள்ளதா ?

5. வழக்கு முழு சொத்தில் கீழ்புறம் 40 சென்ட் பொறுத்தும்



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கிணற்றில் பாதி உரிமை பொறுத்தும் சொத்துரிமை விளம்புகை
மற்றும் உறுத்துக்கட்டளை பரிகாரங்கள் வாதிக்கு

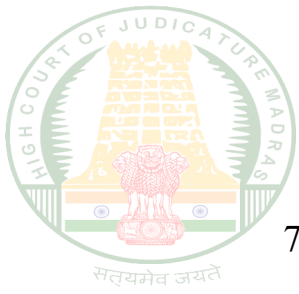
கிடைக்கக்கூடியதா ?

6. வழக்க முழு சொத்தாகிய 1.38 சென்டில் கீழ்புறம் 40 சென்றும் கிணற்றில் பாதியும் வாதிக்கு மாற்றுப் பரிகாரமாக பாகமா கிடைக்க வேண்டுமென்று வாதி கோரும் அப்பரிகாரம் வாதிக்கு கிடைக்கக்கூடியதா ?

7. வாதிக்கு கிடைக்கக்கூடிய பரிகாரங்கள் யாவை ?

5. During the course of trial, on the side of the plaintiff, one witness was examined viz., P. W.1 and two documents were marked as exhibits viz., Ex.A1 & Ex.A2 and on the side of the defendants, two witnesses were examined as D.W.1 and D.W.2 and five documents were marked as exhibits viz., Ex.D1 to Ex.D5. The Commissioner's report and sketch have been marked as Exs.C1 &C2.

6. At the conclusion of the trial and considering the evidences available on record, the trial Court has passed a preliminary decree and the first appeal preferred by the defendants got dismissed. Aggrieved over the same, the present second appeal has been preferred by the defendants.



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7. The Second appeal is admitted and the following substantial

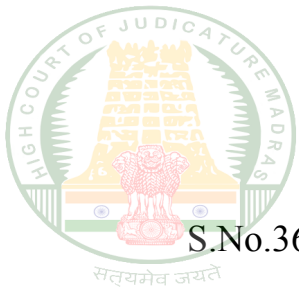
WEB COPIES questions of law are framed:

i) Whether the courts below are justified in granting the alternative relief for partition in favour of the plaintiff in the absence of any plea of joint ownership more particularly when the relief of declaration and permanent injunction was rejected for the very same property ?

ii) Whether both the courts below were right in disregarding the description of the property in the respective title deeds and went wrong in assigning different boundaries contrary to the boundaries that were fixed in the title deeds belonging to both the parties ?

iii) Whether the findings of the both the courts below can be termed as perverse due to improper appreciation of the evidence available on record?

8. Mr.S.Kamadevan, the learned counsel for the appellants / defendants submitted that in Ex.B4 – FMB sketch the sub-division of Survey No.363 has been shown as S.Nos.363/1A & 363/1B. S.No.363/1A is on the northern side and that is the property belonged to the plaintiff. On the southern side S.No.363/1B which is measuring 98 cents, has been purchased by the defendant from Ramasamy. The first appellate Court observed all these details in a clear cut manner and had proceeded to mislead itself on account of the pathway which is available on the southern side of

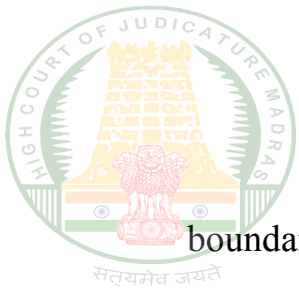


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S.No.363/1B. It is further observed by the appellate Court that the boundaries shown in Ex.A1 is for the entire property and if 40 cents is seen to be fixed on the northern side then the plaintiff may not be able to touch the pathway and hence it is held by the first appellate Court that the FMB showing the plaintiff's 40 cents on the northern side cannot be acceptable. Basing upon the above observation both the Courts below have come to the conclusion that the respondents could have purchased 40 cents only on the eastern side. It is further observed that the exclusive possession of the plaintiffs over 40 cents has not been established. As the whole extent of 1 acre 38 cents originally belonged to three brothers, after partition in the family, 40 cents was allotted to one brother and 98 cents is allotted to another brother. The first appellate Court concluded that the title is vested from the common ancestor.

8.1 The learned counsel for the appellants further submitted that so far as the partition deed Ex.A2 executed between the plaintiff and his brother Chinnaya Gounder is concerned, that had taken place in the year 1978. In the said partition deed the boundaries for 40 cents have been conveniently stated as though 40 cents would be available only on the eastern side, unmindful of the boundaries shown in the earlier sale deeds of the year 1954. The



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boundaries in the sale deed of the year 1954 cannot be conveniently altered by the plaintiff and his brother in the subsequent partition deed – Ex.A2 and claim that the 40 cents is available only on the eastern side. After sub-division, there is no question of any common holding and the Court ought not to have granted the relief of partition once the declaration itself has been denied. The defendants does not deny the fact that the plaintiffs are entitled to 40 cents and their only contention is that 40 cents is available on the northern side as it has been settled earlier and the sub-division is reflecting in the FMB. As the Courts below have misconstrued the entire scope and had given the benefit of common ownership to 1 acre 38 cents even after the sub-division has taken place, the property is sub-divided within the specific boundaries and no question of partition would arise.

9. Mr.P.Gunaraj, the learned counsel for the respondents / plaintiffs submitted that in the sale deed Ex.A1, the boundaries have been shown for the entire 1 acre 38 cents. The boundaries for 40 cents have not been shown specifically. The courts below have rightly appreciated the evidence on record by taking into consideration of the pathway running on the south. The plaintiff has no other access to his properties except by using the south side pathway. As the boundaries have been wrongly fixed in the year 1978 when



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the partition deed was entered into between the plaintiff and his brother and further the mistake has been corrected and the 40 cents fell to the share of the plaintiff on the eastern side. The learned trial Judge and the first appellate Judge has rightly appreciated the origin of the common ownership of the property and had allotted the share of 40 cents to the plaintiff on the eastern side. Hence the appeal is liable to be dismissed.

10. The whole of the property measuring an extent of 1 acre 38 cents in Old Survey No.363/1 (Old Survey No.606/1) was originally belonged to three brothers by name Karuppan, Mottaiyan and Vaiyapoori. There is no dispute on this fact. In an oral partition entered into between Karuppan and his two brothers, 40 cents, on the northern side of 1 acre 38 cents have been allotted to Karuppan and the southern side 98 cents have been allotted to Vaiyapuri. The plaintiff's brother Chinnaya has purchased the share of Karuppan measuring 40 cents through Ex.A1- sale deed dated 01.04.1954. The specific boundaries to the above properties as given in the sale deed is not denied.

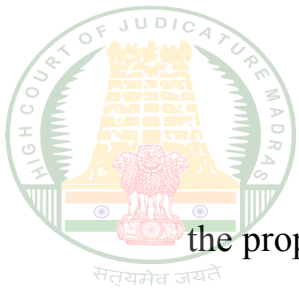
11. It is claimed by the deceased first plaintiff that his brother Chinnaya intended to purchase only 40 cents on the eastern side on the



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whole of 1 acre 38 cents and it is in the western side of “tharisu”. The eastern boundary has been wrongly shown as Ganapathy Udayar's land, but actually the eastern side of remaining lands is Survey No.363/1 (Old Survey No.606/1). The plaintiffs claim that they have taken possession of 40 cents on the eastern side of Survey No.363/1 (Old Survey No.606/1). It is further alleged that during the partition entered into between the plaintiff and his brother on 25.09.1978, the mistake was rectified and the plaintiff was given with 40 cents on the eastern side by stating the correct boundaries. The remaining 98 cents were purchased through Ex.B1 sale deed dated 09.01.1974 by one Ramasamy Gounder from the sons of the original owner, Vaiyapoori Gounder. The plaintiff claims that 98 cents so purchased by Ramaswamy lies on the western side and his property measuring 48 cents is situated on the eastern side. Even though the said fact was not proved to be correct by the plaintiff's own parent title deed Ex.A1 and the defendant's title deed Ex.B1, both the Courts have proceeded to hold that the above boundaries cannot be proved to be correct because there is a pathway on the southern side of Survey No.363/1 (Old Survey No.606/1). So both the Courts below have proceeded on the presumption that if the property purchased by the plaintiff's brother is assumed to be situated on the northern side, the plaintiffs cannot have any access on the route lying on the southern side of



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the property.

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12. The FMB sketch has been marked as Ex.A4. As per Ex.A4, S.No.363 has been sub divided as S.No.363/1A, 364/1B. S.No.363/1A is said to be comprising 40 cents and the remaining 98 cents was purchased by the defendants vendor through Ex.B1. Even according to the evidence of P.W.1 on the northern side of his 40 cents, his family properties are situated. In that case, the defendants ought to have clarified that there is a street running on the southern side of his share but the sub-division has been done otherwise. But so far he has not raised any objection to the sub-division shown in Ex.B4 – Surveyor sketch. But the Courts below did not appreciate the fact that the plaintiff is said to be having his property lying on the northern side.

13. Whenever a sale deed is executed by specifying the boundaries in respect of the property subjected to be sold, the presumption is that the vendor passes his title only to that extent of the property situated within the boundaries shown in the particulars of the property in the sale deed. If there is any mistake in describing the property by showing the boundaries wrongly, then the vendor will be called upon to rectify the same by

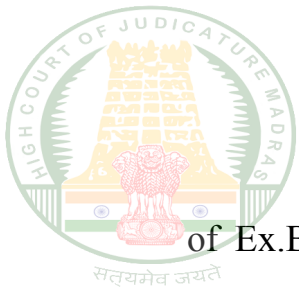


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executing a rectification deed. But the deceased first plaintiff has claimed that the alleged mistake has been rectified by showing the western boundary as Ganapathy Udayar's land and it has been rectified in the subsequent partition deed dated 25.09.1978 executed between the deceased first plaintiff and his brother Chinnaya Gounder and thereby, the deceased first plaintiff have confirmed that the property purchased by Chinnaiya Gounder vide Ex.A1 would represent the property on the 40 cents on the eastern side in Survey No.363/1 (Old Survey No.606/1).

14. The specific contention made by the defendants all along was that in their parent document which is the sale deed, executed by the legal heirs of Vaiyapoori Gounder in favour of Ramaswamy Gounder on 09.01.1974 (Ex.B1) the boundaries have been rightly described and that the property sold to his vendor Ramaswamy Gounder was only the property lying on the southern side with specific boundaries. So the first plaintiff and his brothers cannot, on their own whims, change the boundaries in the subsequent partition deed quite contrary to the title deed Ex.A1. Even if such changes are made that cannot bind neither the second defendant nor his vendor Ramasamy Gounder. As how Ramasamy Gounder purchased the property from the original owner Vaiyapoori Gounder, he has sold the same by virtue

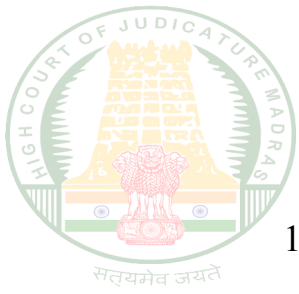


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of Ex.B2 to the second defendant when he was a minor and represented through his father the first defendant.

15. As the plaintiff has filed the suit for declaration, the burden is upon him to prove that he is in possession of an extent of 40 cents on the eastern side. The FMB sketch – Ex.B4 tallies with Ex.A1 and Exs.B1 and B2. So in all probabilities and possibilities the plaintiff cannot find fault with the sub-division or claim that the subdivision has been done without giving any notice.

16. Had the whole of 1 acre 38 cents been purchased by the first plaintiff's brother Chinnasamy Gounder, it could have been possible for his brothers to demarcate any other portion of the property comprising in S.No.606/1 and allot it to either of their share. The whole of 1 acre 38 cents was not owned by the first plaintiff and his brother and hence the first plaintiff and his brother alone cannot make any changes in the boundaries in the subsequent partition deed without the knowledge of the second defendant who is the owner of remaining 98 cents shown well within the boundaries as prescribed in the sale deed Ex.B2.



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17. The learned trial Judge has convinced himself that the first plaintiff is not entitled to the relief of declaration in respect of 40 cents on the eastern side as claimed by him. Though the defendants did not deny the first defendant's entitlement of 40 cents in S.No. 606/1, their specific case is that the location of 40 cents is only on the northern side and not on the eastern side.

18. Admittedly, there was no exchange made between the defendants and the plaintiff in order to change the location of 40 cents for which the first plaintiff is entitled to. Having rendered a finding that the plaintiff is not entitled to 40 cents on the eastern side as claimed by the first plaintiff, the trial Court ought not to have misled itself to grant the relief of partition by specifying 40 cents on the eastern side. Even the first appellate Court did not rectify the error. There is no question of common ownership lying in any common owner after the portions have been divided with specific boundaries and sold by the common owners namely Karuppan and Vaiyapoori in favour of the third parties like the first plaintiff's brother Chinnapa Gounder and the second defendant. But the plaintiffs have raised a point that in Ex.B1, the whole of 1 acre 38 cents have been sold to Ramasamy Gounder and in fact the northern boundary has been shown as Veerammal's land who is the first



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plaintiff's sister. So the trial Judge has analysed that the boundaries of 98 cents have not been properly described in Ex.B1 and hence the 98 cents sold to the vendor of the second defendant Ramasamy Gounder cannot be considered as 98 cents on the southern side.

19. To be noted, Ex.B1 is later in point and Ex.A1 is anterior to Ex.B1. Ex.A1 sale deed has been executed in the year 1954 and Ex.B1 sale deed has been executed in the year 09.01.1974. Even before 20 years when the plaintiff's brother has got 40 cents from one of the joint owners namely Karuppan, he has obtained 40 cents with specific boundaries and hence it can be easily presumed that the 98 cents purchased by the second defendant's vendor through Ex.B1 vendor would only represent the properties on the south portion of the first plaintiff's 40 cents.

20. The sale deed in favour of the second defendant has made it very specific when it was executed in the year 19.04.1984 wherein the boundaries have been specifically stated for 98 cents. In that it has been specifically mentioned that the northern side lands belong to Veera Gounder who is the first plaintiff herein. Without any doubt the first plaintiff's brother Chinnaya Gounder has bought only the northern side 40 cents in the year 1954, as how



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it has been described in his sale deed.

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21. It can be concluded by correlating Ex.B1 with Ex.B2 that 40 cents is lying on the northern side and 98 cents is lying on the southern side. However, Ex.B1 cannot assume any significance that it represents the whole of the boundaries for 1 acre 38 cents. On the other hand the plaintiff's brother's sale deed (Ex.A1) would clarify that what was remaining to be sold to Ramasamy Gounder on 09.01.1994 is the remaining 98 cents on the southern side and that is being conveyed to the second plaintiff through Ex.B2.

22. Though the first appellate Judge has rightly analysed the above aspects, all of a sudden, he had influenced himself by making convenient arrangement for the plaintiff to use the pathway on the southern side. The plaintiff himself has deposed in his evidence that the lands on the northern side of the entire Survey No.363/1 (Old Survey No.606/1) belongs to his family comprising himself, his brother and sister. So in all probabilities the first plaintiff would have been enjoying his 40 cents by coming from his own family lines lying on the northern side. So the Courts below need not have confused much upon the allocation of the pathway of 0.40 cents of the first



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plaintiff from the road lying on the entire south side of S.No.363/1.

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23. The vendors of the plaintiffs and the defendants were the original owners of the suit property and they have partitioned the suit property between themselves.

24. The learned counsel for the appellants / defendants attracted the attention of this Court to the evidence of P.W.1 on this aspect. P.W.1 has stated that before the sale deed was executed in favour of the defendants, the brothers Karuppan, Mottaiyan and Vaiyapuri had partitioned the properties. In such case, there is no question of granting the relief of partition and that too, by specifying the eastern boundary for the share of the plaintiff.

25. The learned counsel for the plaintiff further submitted that when the UDR survey was made, he had paid the fees. In such case, he cannot have any objection for the sub-division. Even if he has got objection, he ought to have made it within the prescribed time limit. Even Ex.A1 sale deed might show the northern boundary as road. The plaintiff has been given with the sub-divided S.Nos.363/1A on the north and the defendants have been given with S.No.363/1B on the south. Thus the sub-division has cleared the



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confusion. The above facts were not considered by the Courts below before granting the relief as required by the plaintiff.

26. Even if any one has got grievance over the determination of the boundaries, as per Section 14 of the Tamil Nadu Survey and Boundaries Act, 1923, they ought to have made objection within three years. The sub-division has already been made and it is available on record as Ex.B4. This would show the demarcation of the property belonging to the plaintiff as S.No.363/1A and the defendants as S.No.363/1B. These facts were not properly appreciated by the Courts below.

27. Having got the sub-division and being in possession of the property as sub-divided, the plaintiff cannot claim some other type of division according to his whims by making use of one description of the boundary 'paathai' on the south side. For the reasons known to the plaintiffs and the defendants, some convenient sub-division has been made and it has been settled.

28. The learned counsel for the appellants / defendants submitted that even the plaintiff's suit is dismissed, he may not have the pathway for the



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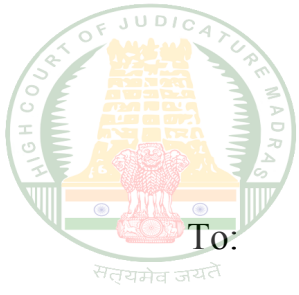
land lying in S.No.363/1A immediately on the eastern side. The property in S.No.363/4 also belonged to the plaintiff and hence, he can very well have the pathway to his property.

29. Since the Courts below did not appreciate the FMB records and the evidence of the plaintiff where he has stated that the original owners have partitioned the property between themselves and that the plaintiff himself has paid the fee for sub-division, the judgments of the Courts below are seen to be shortsighted and they are liable to be set aside.

30. In the result, the Second Appeal is **allowed** and the judgment and decree in A.S.No.136 of 2002 dated 29.10.2003 on the file of the District Judge, Permabalur, is hereby set aside and the suit in O.S.No.99/1993 on the file of the District Munsif, Perambalur, is dismissed. No costs. Connected miscellaneous petition is closed.

22.11.2024

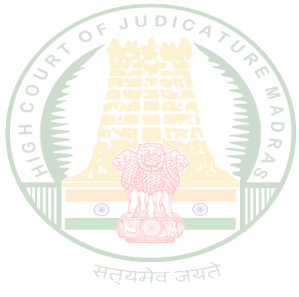
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To:

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1. The District Judge, Perambalur
 2. The District Munsif, Perambalur.



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R.N.MANJULA, J.

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