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S.A.No.383 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **05.04.2023**

CORAM

THE HON'BLE MR. JUSTICE V.LAKSHMINARAYANAN

S.A.No.383 of 2002

1.Natarajan
2.Duraisamy

... Appellants

Vs.

1.Thangavel
2.Chellamuthu (Died)
3.P.Natarajan
4.C.Jayamani
5.Baby
(R2 died, R4 and R5 are brought on record
as LR's of the deceased R2 vide order
of the Court dated 07.07.2022 made in
C.M.P.No.14289, 14290 and 14292 of 2021
in S.A.No.388 of 2002 [CVKJ])

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree of the Subordinate Judge's Court at Kallakurichi dated 30.07.2001 in A.S.No.122 of 1998, reversing the Judgment and Decree of the I Additional District Munsif Court at Kallakurichi dated 25.09.1998 in O.S.No.170 of 1992.



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S.A.No.383 of 2018

For Appellants : Mr.P.Valliappan
Senior Counsel
for Mr.T.R.Gayathri

For Respondents : Mr.S.Kaithamalai Kumaran
for R1, R4 and R5

R2 - Died

R3 - No Appearance

JUDGMENT

The appellants before this Court are the defendants in the Suit. The Appeal is on a very narrow compass. It is whether I should prefer Ex.B1, registered Agreement dated 25.06.1981, or the report of the Advocate Commissioner dated 27.02.1998.

2. The plaintiffs claimed title over a total extent of 9 Acres 89 Cents situated in R.S.No.195/1 comprised in Old Patta No.34 of Elavadi Village, Kallakurichi Taluk. The defendants did not resist the title of the plaintiffs for the said Survey Number but pleaded that there is an agreement for a passage dated 25.06.1981 which had been marked as Ex.B1.



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3. The Trial Court granted a decree of title to the plaintiffs to the entire extent save the passage which had been agreed to under Ex.B1. The Lower Appellate Court reversed it on the ground that the Advocate Commissioner who visited the site did not find a passage as mentioned under Ex.B1.

4. I heard the Appeal on the following substantial questions of law:

"1. When the appellants have got a clear passage right over the suit property by virtue of Ex.B.1 Agreement dated 25.06.1981 and when the appellants have established the genuineness of Ex.B.1 Agreement, whether the lower Appellate Court is correct in law in discarding the same, as not acted upon?"

2. Whether the lower Appellate Court is correct in law in reversing the Judgment and Decree of the trial Court without specifically setting aside the findings of the Trial Court to the effect that Ex.B.1 Agreement has come into force even according to the



respondents 1 and 2?

3. Whether the lower Appellate Court is justified in law in discarding the oral evidence of D.Ws.1 to 4 coupled with Exs.B1 and B2 which would establish the passage right enjoyed by the appellants?

4. Whether the plea of estoppel will operate against the respondents 1 and 2 in view of the fact they had referred to Ex.B1 Agreement even in Ex.B2 - Suit notice dated 23.10.1991 and admitted the right of the appellants over the same?

5. Whether the lower Appellate Court is justified in law in misconstruing Exs.C1 and C2 Commissioner's Report and Plan, as though the same would prove that Ex.B1- Agreement, is not acted upon?"

5. Learned counsel for the Appellants drew my attention to the agreement (Ex.B1) and to Ex.B2, the Suit Notice. In the reply to the Suit Notice dated 23.10.1991, the existence and enjoyment of a passage had been accepted. The Lower Appellate Court allowed the Appeal on the ground that



the passage contemplated under Ex.B1 was not found on the ground by the Advocate Commissioner either in his report in Ex.C1 or in his plan under Ex.C2.

6. The first Appellate Judge ought to have taken note of the fact that the Commissioner had, in his exuberance, exceeded the scope of the warrant. He was called upon to inspect the suit property and to submit a report as to whether there is a battai or not. The report states that there is a battai ["பாத்தை"] but finally in the conclusion, it states that the battai contemplated under Ex.B1 does not exist on the ground.

7. The learned first Appellate Judge has failed to appreciate that the Suit had been presented in the year 1992 and the Advocate Commissioner was invited to visit the Suit property on 27.02.1998. Despite the passage of nearly 7 years, he does find a passage in the Suit property. The lower Appellate Court also failed to take note of the Suit Notice where under the existence of the passage is conceded. The reply shows that the parties are in enjoyment of the passage right from 25.06.1981. It might be true that the



extent, under Ex.B1, is not found on the ground on the date of inspection.

To enforce this agreement the parties have to workout their rights by way of Suit of specific performance or otherwise and I am not concerned with it.

8. Having agreed to burden his land by way of passage under Ex.B1, it is not open to the respondent to plead that the passage which exists as on today does not correspond to the passage which was contemplated under the agreement Ex.B1. The failure to appreciate Exs.B1 and B2 is a perverse finding. I am not able to agree with Mr.S.Kaithamalai Kumaran, learned counsel for the respondent Nos.R1, R4 and R5, that the findings of the lower Appellate Court that the Exs.C1 and C2 are through the Commissioner's report. This is so because, the Commissioner has exceeded the scope of his warrant.

9. The Appeal is allowed. Judgment and Decree of the Trial Court in O.S.No.170 of 1992 dated 25.09.1998 on the file of the I Additional District Munsif, Kallakurichi is restored. Plaintiffs are declared to be the owner of the property Suit in Survey No.195/1 to an extent of 9 Acres 89 Cents less the extent mentioned in Ex.B1 agreement. The Judgment and Decree of the



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First Appellate Court in A.S.No.122 of 1998 dated 30.07.2001 on the file of
the Subordinate Judge, Kallakurichi is set aside. No Costs.

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Index : Yes/No
Speaking Order : Yes / No
Neutral Citation Case: Yes / No
ab

To

1. The Subordinate Judge,
Kallakurichi.

2. The I Additional District Munsif,
Kallakurichi.



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V.LAKSHMINARAYANAN. J.,

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