



*S.A.No.2181 of 2001*

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 10.04.2023

CORAM

**THE HON'BLE MR.JUSTICE P.VELMURUGAN**

**S.A.No.2181 of 2001**

- 1.M.S.Balasubramanian Karaiyalar (died)
- 2.Shanmugathai
- 3.Vijaya Prabha
- 4.Jeyasankar

**(Appellants 2 to 4 are brought on record as  
Legal Heirs of the deceased sole appellant  
vide court order dated 19.08.2019  
in M.P(MD)Nos.2 & 3 of 2013.)**

... Appellants

-VS-

- 1.M.S.Shanmugavel Karaiyalar (died)
- 2.R.Pitchammal
- 3.Auvaiyar @ Anotha

**(R2 & R3 are brought on record as Legal Heirs of  
the deceased sole respondent vide  
court order dated 03.04.2013 made in  
MP(MD)No.3/2011)**

..Respondents



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**PRAYER:** Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree made in A.S.No.94 of 2000 dated 27.06.2001 on the file of the Subordinate Judge, Sankarankovil reversing the Judgment and Decree made in O.S.No.440 of 1994 dated 17.10.2000 on the file of the Principal District Munsif, Sankarankovil.

For Appellants ... Mr.M.P.Senthil

For Respondents ... Mr.F.X.Eugene

### **JUDGMENT**

The appellant is the defendant in O.S.No.440 of 1994 on the file of the Principal District Munsif, Sankarankovil. The respondent/plaintiff filed the said suit against the appellant/defendant for declaration and injunction to declare the second item of the property belongs to the plaintiff and to direct the defendant to remove the bunk shop set up in the said property and vacate and handover the same and till then, he is entitled to get *mesne* profits and also costs.

2. After trial, the trial Court dismissed the suit. Challenging the said Judgment and Decree, the deceased respondent/plaintiff filed an appeal before the Subordinate Court, Sankarankovil in A.S.No.94 of



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2000. The lower appellate Court, after hearing arguments, allowed the appeal and set aside the Judgment and Decree passed by the trial Court and decreed the suit. As against which, the appellant/defendant has filed the present second appeal before this Court raising the following substantial questions of law:-

“1. Whether the Judgment and Decree of the Lower Appellate Court in reversing the well considered Decree and Judgment of the trial Court is vitiated by its failure to consider the specific defense raised and casting the burden of proof on the appellant.

2. Whether the findings of the lower appellate Court are vitiated by its failure to consider the enjoyment of the 2<sup>nd</sup> schedule property on the admissions of PW1 and the physical features as reported by the Advocate Commissioner under Exs.C1 and C2.

3. Whether the lower appellate Court is right in not advertng to the boundary recitals in Ex.A1 and Ex.B8.

4. Whether the lower appellate Court committed on error of law in giving a inconsistent finding on the recitals on Ex.A1, B1.”

3. However, this Court, considering the facts and circumstances of the case, while admitting the second appeal, has formulated the following substantial questions of law:-



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“1. Whether the Judgment and Decree of the Lower Appellate Court in reversing the well considered Decree and Judgment of the trial Court is vitiated by its failure to consider the specific defense raised and casting the burden of proof on the appellant.

2. Whether the findings of the lower appellate Court are vitiated by its failure to consider the enjoyment of the 2<sup>nd</sup> schedule property on the admissions of PW1 and the physical features as reported by the Advocate Commissioner under Exs.C1 and C2.

3. Whether the lower appellate Court is right in not advertng to the boundary recital in Ex.A1 and Ex.B8.

4. The case of the deceased respondent/plaintiff is that the suit property and connected other properties originally belonged to the plaintiff, defendant, their brothers and father as joint family properties and there was a partition on 28.11.1968. As per the partition, the first schedule property was allotted to the deceased respondent/plaintiff and western properties and house bearing Door No.106 were allotted to the deceased appellant/defendant and his brothers. As per the partition, the plaintiff and defendant and other sharers were enjoying their respective shares. The suit second schedule property is a part of the suit first



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schedule property. A thatched house bearing Door No.97 is available in the first schedule property. North of the said thatched house, a vacant place measuring east-west 6 feet and north-south 22 feet was also in the enjoyment of the plaintiff. The defendant is the brother of the plaintiff born through the second wife of his father Sankarapandia Karaiyalar. The plaintiff permitted the defendant to erect a bunk shop measuring east to west 6 feet and north to south 6 feet and it is shown as second schedule property. Since there was a disturbance to reach his house, the plaintiff asked the defendant to remove the same and also cancelled the permission by sending a notice dated 05.10.1994 and the defendant also on receipt of the notice, sent a reply on 12.10.1994. From the date onwards, the defendant is also liable to pay the damages.

5. The case of the appellant/defendant is that he has been enjoying the second schedule property for more than 20 years and therefore, he has perfected title by adverse possession. The property north to the second schedule property belonged to one Subbiah Pillai and others. The only pathway available to reach his bath room and latrine just adjacent to the northern side of the bunk shop. The defendant is having the easementary right over the pathway and the said right of pathway is



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conferred in a partition deed also. Therefore, the plaintiff is not entitled to get any relief.

6. During trial, on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 9 documents were marked as Exs.A1 to A9. On the side of the defendant, two witnesses were examined as D.W.1 and D.W.2 and eight documents were marked as Exs.B1 to B8. Besides, two Court documents were marked as Exs.C1 and C2.

7. Considering the above pleadings, oral and documentary evidence, the trial Court dismissed the suit and held that the plaintiff has not established his right and title and enjoyment. Therefore, the plaintiff filed the appeal before the Subordinate Court, Sankarankovil in A.S.No. 94 of 2000. Since the appeal suit was allowed, the defendant is before this Court.

8. Admittedly, the suit property is originally belonging to the plaintiff, defendant and their father and brothers as joint family property. Their father got two wives. The plaintiff is the son of one wife and the defendant is the son of other wife. Admittedly, they entered into a



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registered partition deed on 28.11.1968. A copy of the said partition deed was marked as Ex.A1. The original partition deed was marked as Ex.B1. A registration copy of the said partition deed was also marked as Ex.A9. Hence, Exs.A1, A9 and B1 are one and the same. Their properties are including subject matter of the properties through the registered partition deed.

9. The learned counsel for the appellants would submit that the specific recital in the partition deed (Ex.A.1) is referring to the allotment of the property to the respondent/plaintiff by incorporating specific boundaries. The second schedule property is a small bunk shop and the respondent/plaintiff cannot have any claim over the second schedule property. The recital in the partition deed granted the right to ingress and egress. The burden of proof that the second schedule property is form part of the first schedule property, is upon the respondent/plaintiff. The respondent/plaintiff has not proved the same and he has not discharged his burden. The Advocate Commissioner inspected the suit property and filed a report. The report and plan were also marked as Exs.C1 and C2. D.W.1 is also corroborated the report and plan of the Advocate Commissioner and there was existence of toilet and both room sewerage



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to the second schedule property. The defendant is in long enjoyment and he has got prescriptive title by adverse possession on said schedule. The permission was granted by the respondent/plaintiff to put up a shop over the second schedule. The partition deed and the Commissioner's Report will prove that the plaintiff has no right and enjoyment of the suit second schedule. Though the trial Court rightly appreciated and dismissed the suit, the first appellate Court failed to consider the oral and documentary evidence and allowed the appeal, which is erroneous.

10. Heard the learned counsel appearing on either side and perused the materials available on records.

11. Since the substantial questions of law formulated by this Court are interconnected, all the substantial questions of law have been taken together and discussed.

12. Admittedly, both the plaintiff and the defendant are half brothers and there was a family partition under Exs.A1, B1 and A9. As already stated, all the three documents are one and the same. Ex.B1 is the original partition deed. A reading of the recital in Ex.B1 partition



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deed shows that the second schedule property was allotted to the appellant/defendant and the first schedule was allotted the respondent/plaintiff. The second schedule in second item is specifically given the extent and boundaries. Only the right has been given to use the said schedule of property as a pathway to pass through his land. Even in the partition deed, the second schedule property shown as pathway and both the parties can use this property only as pathway. Subsequently, in the portion of the said pathway, the defendant put up a bunk shop. The plaintiff did not object and later, since there was a dispute arose, the plaintiff asked to remove the same and the defendant refused to do the same. Hence, the present suit.

13. A reading of Ex.B1 partition deed shows that in the second schedule property, both the parties have liberty to use as pathway and even in the Commissioner Report Exs.C1 and C2, the existence of pathway also clearly shown. Both the parties, in their evidence also, have admitted the partition deed and property shown as pathway and they used the same as pathway. Therefore, there is no dispute that as per the partition deed, the property allotted to the appellant/defendant is situated in western side. The properties allotted to the respondent/plaintiff is



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situated in eastern side and in the east to the respondent/plaintiff's property, Tirunelveli Main Road is situated. From the said main road, the appellant/defendant has to reach his portion through the passage, which is situated in the northern side of the respondent/plaintiff's property. The Commissioner's Report and the evidence show that in the Tirunelveli Main Road and in the starting point of the passage, the defendant put up a bunk shop. Now, the entire passage has been shown as a first schedule in the suit property and the bunk shop shown as second schedule in the plaint.

14. Now, the learned counsel for the appellant/defendant admitted that at the time of filing the suit and also during the Advocate Commissioner's inspection, there was a bunk shop in the second schedule. Therefore, in the plan of the Advocate Commissioner, this shop has been shown. Subsequently, pending appeal, the appellant/defendant removed the said bunk shop. Though the respondent/plaintiff filed the suit seeking declaration that the entire property and pathway belong to the respondent/plaintiff and he sought for the relief of removal of bunk shop and also damages, the trial Court, considering Ex.B1, dismissed the suit. Whereas, the first appellate Court



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failed to consider the recitals mentioned in Ex.B1-partition deed that the appellant/defendant was given a passage right in the partition deed and he can reach his house through this passage, allowed the appeal and decreed the suit declaring that the entire property belongs to the respondent/plaintiff, which is against the recital mentioned in the partition deed.

15. The learned counsel for the respondent/plaintiff also fairly conceded that the right to use the passage has been given to the appellant/defendant in Ex.B1-partition deed and the appellant/defendant, all of sudden, put up a bunk shop. Since there was nuisance, the respondent/plaintiff requested the appellant/defendant to remove the bunk shop and filed the suit. Now, the said bunk shop has been removed and also the said schedule of property is using as a passage. Though both the parties have not given true version, however, during the examination as witnesses, they have admitted that the said schedule of property is a passage. The respondent/plaintiff should keep that property as vacant, the appellant/defendant has got right to use that passage. Exs.C1 and C2 clearly show that the disputed property is a passage. As per the recital in Ex.B1, the appellant/defendant can use the passage and



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they are also using the passage. Though the respondent/plaintiff need not use the pathway, he should kept it as vacant, since the right to use that pathway has been given to the appellant/defendant.

16. Therefore, considering the recital of Ex.B1-partition deed, Commissioner's Report and Plan (Exs.C1 and C2), and the admission of P.W.1, this Court finds that now, the bunk shop has been removed from that passage and it is not existing as of now. Though the trial Court dismissed suit, the first appellate Court allowed the appeal and declared that the entire schedule of properties are belonged to the respondent/plaintiff, which is against the evidence of all the parties. As per Ex.B1 partition deed, the exclusive right has not been given to the respondent/plaintiff. Since the respondent/plaintiff has no absolute right over the suit property and the passage right has been given to the appellant/defendant, the Judgment of the first appellate Court is set aside and modified to the effect that the appellant/defendant has got right to use the second schedule as a passage without making any obstruction. The substantial questions of law are answered accordingly.



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17. With the above modification, this Second Appeal is partly allowed. No costs.

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NCC : Yes/No

Index : Yes/No

Internet: Yes

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To:

1.The Subordinate Judge, Sankarankovil.

2.The Principal District Munsif, Sankarankovil.

3.The Record Keeper,  
V.R. Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**P.VELMURUGAN, J.**

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