

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2017

PRONOUNCED ON : 30.10.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.853 of 2001

1. Ramaswamy Gounder
2. Subramania Gounder
3. Kandaswamy Gounder Appellants/Plaintiffs

Vs.

1.Chinna Gounder
2.Nallayya Gounder alias
Nallusamy Gounder
3.Kumara Gounder
4.Chinnammal
5.Srinivasan Respondents/Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 28.02.2001 passed in A.S.No.173 of 1993 on the file of the Subordinate Court, Namakkal confirming the Judgment and Decree dated 23.06.1999 in O.S.No.757 of 1989 on the file of the District Munsif Court, Namakkal.

For Appellants : Mr.S.Saravanakumar
for M/s.V.Krishnan

For Respondent : Mr.K.Kuppusamy
Nos.1 to 3

For Respondent : No appearance
Nos.4 & 5

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 28.02.2001 passed in A.S.No.173 of 1993 on the file of the Sub-Court, Namakkal confirming the judgment and decree dated 23.06.1999 passed in O.S.No.757 of 1989 on the file of the District Munsif Court, Namakkal.

2. Parties are referred to as per their rankings in the

trial Court

3. Suit for declaration, mandatory injunction and permanent injunction.

4. The case of the plaintiffs, in brief, is that the lands shown as "B" series in the plaint plan belonged to the plaintiffs and the defendants 4 & 5 and the lands shown as D1 & D2 belonged to the defendants 1 & 2 and the lands shown as D3 belonged to the third defendant and all the above said lands and the other lands originally belonged to one Varadhappa Gounder and the said Varadhappa Gounder, for the convenient enjoyment of the above said lands, in order to have access to Kollimalai for taking his cattle, Cart, etc., formed a pathway to the South of the lands of the plaintiffs and to the North of the lands of the defendants 1 to 3 measuring an extent of 25 links running east-west and the said pathway is shown as ABCD in the plaint plan and the pathway extends to the South portion also upto the point E and in continuation of the above said pathway i.e. shown as ABCDE, the predecessor in title viz., Varadhappa Gounder and the predecessors in interest of the plaintiffs and the defendants were using the pathway measuring an extent of 25 links and as such, the plaintiffs are having right to use the pathway for taking cattle, cart, vehicle etc., along the pathway and the defendants are not entitled to prevent the plaintiffs from enjoying the pathway as above. While so, the defendants 1 & 2 and the vendors of the third defendant viz., Sadhasivam, gradually encroached into the pathway and annexed certain portions of the pathway measuring to an extent of 15 links along with their lands, to which, they are not entitled to and thereby, the defendants had interfered with the right and enjoyment of the pathway by the plaintiffs and hence, the plaintiffs have been constrained to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that it is not in dispute that the lands of the plaintiffs and the defendants originally belonged to Varadhappa Gounder and it is also admitted that Varadhappa Gounder had formed a pathway to the South of the plaintiffs lands and to the North of the defendants lands for reaching the road leading to Kollimalai and however, it is contended that the said pathway does not measure 25 links as claimed by the plaintiffs and the above said pathway was measuring only an extent of 13 links and beyond that, the plaintiffs are not entitled to use the pathway measuring an extent of 25 links as put forth by them in the plaint and further, the lands, on which, the pathway runs belonged to the defendants and the plaintiffs cannot claim any absolute right over the lands, on which, the pathway runs and it is false to state that the defendants 1 & 2 and the vendor of the third

defendant had gradually annexed the portions of the pathway along with their lands and thereby, attempted to interfere with the plaintiffs' enjoyment of the pathway and the pathway is in existence only to an extent of 13 links right from the inception and only to the above said extent, the plaintiffs are entitled to use the pathway and hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PWs 1 to 3 have been examined and Exs. A1 to A10 were marked. On the side of the defendants, DW1 & 2 were examined and Exs. B1 has been marked. Exs. C1 & 2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court noting that the lands, on which, the alleged pathway is said to be running belongs to the defendants and as such, the plaintiffs are not entitled to claim any absolute right to use the same and further, holding that the plaintiffs having failed to establish that the pathway measures to an extent of 25 links and on the other hand, finding that the pathway measuring an extent of 13 links only exists as put forth by the defendants, accordingly, granted the reliefs of mandatory injunction and permanent injunction in favour of the plaintiffs as regards the pathway of an extent of 13 links only and as regards the relief of declaration sought for by the plaintiffs, the same had been negatived as unnecessary. The first appeal preferred by the plaintiffs as against the judgment and decree of the trial court was also dismissed. Aggrieved over the same, the present second appeal preferred by the plaintiffs.

8. At the time of the admission of the second appeal, the following substantial questions of law were formulated for consideration;

"1. Whether the learned subordinate judge erred in law in ignoring the admission of defendants that a pathway along ABCDE existed and measured 20 links at point D and 21 links at point E as shown in Commissioner's plan?

2. Whether the learned subordinate judge was justified in not taking into consideration the measurements given by the Commissioner in his plan Exhibit C22?

3. Whether the learned Subordinate Judge was justified in relying on Exhibit B1 which did not apply to a pathway in private property?

9. The suit relates to pathway. It is not in dispute that

the lands of the respective parties and the other lands originally belonged to Varadhappa Gounder. It is also not in dispute that Varadhappa Gounder had formed a pathway in the lands owned by him for reaching Kollimalai on the eastern side and accordingly, it is admitted that the pathway had been formed to the South of the lands of the plaintiffs and to the North of the lands of the defendants and accordingly, it is admitted that all along the said pathway, the parties had been taking their cattle, cart, vehicle etc., for reaching Kollimalai. Now, according to the plaintiffs, the pathway measures an extent of 25 links and the defendants gradually annexed the portions of the pathway along with their lands unlawfully, to which, they are not entitled to and thereby, prevented the plaintiffs from enjoying the pathway measuring to an extent of 25 links and hence, according to them, they had been constrained to lay the suit for appropriate reliefs.

10. Per contra, it is the specific case of the defendants that from the inception, the pathway that had been formed measures only to an extent of 13 links and only to that extent, the plaintiffs are entitled to use the pathway and the allegation that the pathway measured to an extent of 25 links is utter falsehood and the further allegation that the defendants had gradually annexed the portion of the pathway measuring to an extent of 25 links along with their lands and thereby, prevented the plaintiffs from enjoying the pathway measuring to an extent of 25 links is false and denied and the lands, on which, the pathway measuring to an extent of 13 links runs belonged to the defendants and the plaintiffs cannot claim any absolute right over the same and hence, the plaintiffs are not entitled to seek and obtain the reliefs sought for in the plaint.

11. As seen above, the Courts below have held based on the materials placed that the pathway exists between the lands of the respective parties only measuring to an extent of 13 links and the lands, on which, the said pathway runs belonged to the defendants and holding so, accordingly, granted the reliefs of mandatory and permanent injunction in favour of the plaintiffs. Aggrieved over the same, the second appeal has been preferred.

12. As rightly held by the Courts below, it is found that the documents of title of the properties owned by the parties concerned and marked as Exs.A1 to A3 , A9 & A10 would only go to show that their existed a pathway between the lands of the parties for taking cattle, cart, vehicle etc., but in none of the above said documents, the width of the pathway has been mentioned. It is no where stated in the above said documents that the pathway that had been formed had been in existence measures to an extent of 25 links as put forth by the plaintiffs. It is thus rightly found by the Courts below that

the plaintiffs, without any basis, has claimed that the pathway that had been formed at inception measures to an extent of 25 links. Therefore, it is seen that there is no material placed, as such, on the part of the plaintiffs to hold that the alleged pathway measures to an extent of 25 links. In such view of the matter, the further case of the plaintiffs that the defendants had gradually annexed the portions of the pathway measuring to an extent of 25 links along with their lands and thereby, prevented the plaintiffs from enjoying the pathway measuring to an extent of 25 links as such cannot be countenanced in any manner.

13. The other documents pressed into service on behalf of the plaintiffs are not in any manner helpful to support the plaintiffs' case that the pathway measures to an extent of 25 links. Further, the field map marked as Ex.B1, as rightly determined by the Courts below would go to show that the pathway measures only to a lesser extent and accordingly, it has been so detailed in the said field map Ex.B1 and therefore, the contention that the pathway measured to an extent of 25 links from the inception as such cannot be accepted in any manner. The document marked as Ex.B1, as rightly found by the Courts below, goes against the case of the plaintiffs and only support the case of the defendants that the pathway had been in existence from the inception only measuring to an extent of 13 links. That apart, in this case, the commissioner had been appointed and inspected the suit property concerned and filed his report and plan marked as Exs.C1 and 2 and a perusal of the above said documents would also go to show that as rightly determined by the Courts below, the pathway at various points are found to be measuring only 10 links , 9 links , 12 links, 11 links, 13 links as noted by the Courts below and accordingly, it is also found that the same has been admitted by the witness examined on behalf of the defendants. It is seen further that the parties have not placed any objection to the report and plan of the advocate commissioner. In addition to that, it is seen that the commissioner report and plan also goes in support of the field maps Ex.B1 and when the title deeds produced on behalf of the plaintiffs do not in any manner indicate about the width of pathway as measuring to an extent of 25 links, it is seen that the materials placed on record only point out that the pathway measures to an extent of 13 links.

14. It is argued by the plaintiffs' counsel that the defendants have admitted the existence of pathway measuring to an extent of 20 links at certain points and therefore, the Courts below have failed to consider the above said admission of the defendants in support of the plaintiffs' case. However, a

combined reading of the evidence of the defendants in conjunction of the report and plan of the advocate commissioner would go to show that the defendants have not admitted that the pathway is measuring to an extent of 25 links as put forth by the plaintiffs and on the other hand, they have only asserted that the pathway measures only a lesser extent and their testimony that at two places, the pathway measures to an extent of 20 links and 21 links by themselves would not lead to the conclusion that the pathway measures to an extent of 25 links right through i.e. ABCDE portion as projected by the plaintiff. Hence, the above plea put forth by the plaintiffs' counsel cannot be accepted in any manner.

15. In the face of the reality that the documents projected by the plaintiffs are not helpful to hold that the pathway is measuring to an extent of 25 links as pleaded by the plaintiffs, it is found that the Courts below are justified in taking into account the commissioner's report and plan and the field map plan for determining the extent of the pathway and further, when the plaintiffs have failed to establish that the defendants have encroached into the portion of the pathway as pleaded by them, it is seen that no exception could be taken in the determination of the Courts below regarding the issue based upon the report and plan of the advocate commissioner. Equally, it is found that the Courts below are also justified the relying upon Ex.B1, the field map plan, as the same is also additional factor to hold that the pathway did not measure to an extent of 25 links at any point of time and had been in existence measuring only to an extent of 13 links as determined by the Courts below and accordingly, it has been so detailed in the field map plan Ex.B1

16. The Courts below have rightly held that the plaintiffs cannot claim any absolute right over the pathway of an extent of 13 links and accordingly, rightly declined the relief of declaration sought for by the plaintiffs. Considering the facts and circumstances of the case, it is found that the Courts below have rightly held that the pathway in existence from the inception measures only an extent of 13 links and accordingly, granted appropriate relief as regards the same in favour of the plaintiffs. In such view of the matter, the judgment and decree of the Courts below are not liable to be interfered with in any manner as they are not shown to be suffering from any infirmity, errors or mistakes. In such view of the matter, the substantial questions of law formulated for consideration in this second appeal are answered against the plaintiffs and in favour of the defendants.

In conclusion, the second appeal fails and is accordingly

dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

sms

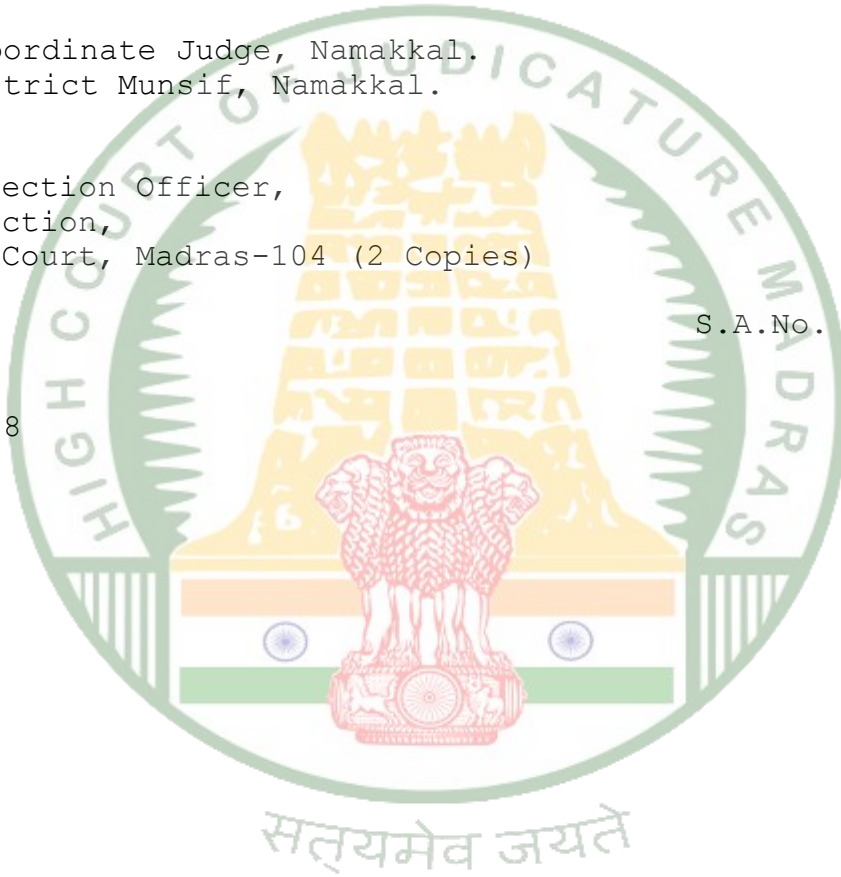
To

1. The Subordinate Judge, Namakkal.
2. The District Munsif, Namakkal.

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S.A.No. 853 of 2001

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