

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.12.2021

PRONOUNCED ON : 07.06.2022

CORAM

THE HON'BLE MRS.JUSTICE J.NISHA BANU

SECOND APPEAL Nos.1241 and 1242 of 2000

Second Appeal No. 1241 of 2000

1.J.M.Palanisamy (died)

2.J.M.Thangavel

3.J.M.Perumal

...Appellants 1 to 3/Appellants 1 to 3/Defendants 2 to 4

4.Arukkani

5.Dinesh Kumar

...Appellants 4 & 5

(Appellants 4 and 5 brought on records as LRS of the deceased
1st appellant vide Court order dated 10/03/2019 made in
CMP.No.4391, 4394 and 4396 of 2019 in S.A.No.1241 of 2000)

vs

1.Veeran (died)

2.Guruvan

3.Ramasamy

...Respondents 1 to 3/Defendants 2 to 4/ Plaintiffs 2 to 4

4.Narayanan Gounder

5.Saravanan

6.Sengottaiyan

7.Kandasamy

8.Nallasamy Gounder

9.Karuppanna Gounder

...Respondents 4 to 9/Respondents 5 to 10 /
Defendants 1 & 5 to 9

10.Venkatesan

[R 10 brought on records as LR of the deceased
R-1 viz.,Veeran vide order dated 15/11/2019 in
CMP.No.15610/2019]

Second Appeal No. 1242 of 2000

1.J.M.Palanisamy (died)

2.J.M.Thangavel

3.J.M.Perumal

...Appellants 1 to 3/Appellants 1 to 3/Plaintiffs 1 to 3

4.Arukkani
5.Dinesh Kumar

...Appellants 4 & 5

(Appellants 4 & 5 brought on records as LRS of the deceased
1st appellant vide order of Court dated 10/03/2019 made in
CMP.No.4398, 4402 & 4405 of 2019 in S.A.No.1242 of 2000)

Vs

1.Saravanan
2.Sengottaiyan
3.Kandasamy

...Respondents/Respondents/Defendants

Prayer in S.A.1241 of 2000: Second Appeal filed under Section 100 of CPC., against the decree and judgment dated 31.03.2000 made in A.S.No.119 of 1998 on the file of Sub-Judge, Bhavani, Erode District, confirming the judgment and decree dated 01.09.1998 made in O.S.No.721 of 1991 on the file of the Additional District Munsif, Bhavani, Erode District.

Prayer in S.A.1242 of 2000: Second Appeal filed under Section 100 of CPC., against the decree and judgment dated 31.03.2000 made in A.S.No.118 of 1998 on the file of Sub Judge, Bhavani, Erode District, confirming the judgment and decree dated 01.09.1998 made in O.S.No.628 of 1991 on the file of Additional District Munsif, Bhavani, Erode District.

For Appellant
in both Second Appeals : Mr.S.Parthasarathy, Senior Counsel
for M/s.P.T.Ramadevi

For respondents
in S.A.No.1241 of 2000 : Mr.T.Murugamanickam, Senior counsel
for R5 to R7.

COMMON JUDGMENT

The Second Appeals are filed by the appellants praying to set aside the judgment and decree in A.S.Nos.118 of 1998 and 119 of 1998 dated 31.03.2000 on the file of Sub Court, Bhavani, Erode District, confirming the judgment and decree in O.S.No.628 of 1991 and O.S.No.721 of 1991 dated 01.09.1998 on the file of Additional District Munsif, Bhavani, Erode District.

2. The defendants 2, 3 and 4 in O.S.No.721 of 1991 are the appellants in S.A.No.1241 of 2000. The suit in O.S.No.721 of 1991 was filed for Permanent injunction, not to put up any construction or planting any trees in the suit cart track and Mandatory injunction directing the defendants to remove the encroachment made in Suit Cart track. O.S.No.721 of 1991 was decreed in favour of the plaintiffs. Defendants 1 to 3 filed

A.S.No.119 of 1998 before the Sub Court, Bhavani, Erode District. The lower appellate court confirmed the findings of the trial court and dismissed the First appeal. The suit property for which the relief sought for is R.S.No.850/8 , 850/7 and 854/2. Against the concurrent findings of courts below, S.A.No.1241 of 2000 has been filed.

3. The suit in O.S.No.628 of 1991 is filed for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of suit property. The plaintiffs are the appellants in this Second Appeal. The suit was dismissed as against the plaintiffs and the First Appeal in A.S.No.118 of 1998 was also dismissed. Against which, this second appeal in S.A.No.1242 of 2000 has been filed. The suit property for which the relief sought for is Agricultural punja land in R.S.No.850/5, 8 and 9 measuring an extent of 5 acres and 81 ½ cents.

4. The facts of the case in O.S.No.628 of 1991 is as follows:-

(a) The plaintiffs are brothers and the suit property belongs to their father which they got it through an oral partition 50 years ago and have been in possession since then. The defendants have been in possession of the land in Survey No.850/6 which is located to the east of the suit property. People who live to the east of the plaintiffs' land have to cross the 6 ft suit car track to reach the south-north road. The property on both sides of the cart track belongs to the plaintiff. The plaintiff's property is lower than the said track. The plaintiffs state that the defendants are trying to disturb their peaceful enjoyment and they have no right to do the same. Therefore, the plaintiffs filed the present suit in O.S.No.628 of 1991 for permanent injunction restraining the defendants, not to disturb their possession over the suit property.

(b) The defendants who filed written statement denied all the contentions made by the plaintiffs and state that the plaintiffs does not own any land that is located to the south of the track. The track is not elevated and it is of 20 feet and the plaintiffs have encroached the cart track. As per the revenue record, in Survey No.850/8, the car tracks measures upto 0.10 hectares and the plaintiff had no right to reduce the extent of the car track. The defendants state that the plaintiffs does not have land on both sides and they have no right over the track. The defendants state that the plaintiffs cannot stop them from using the track to move their cows and tractors.

5. The facts of the case in O.S.No.721 of 1991 is as follows:-

(a) The plaintiffs and defendants in O.S.No.628 of 1991 are the defendants 2 to 7 in the suit in O.S.No.721 of 1991.

(b) The plaintiffs have their property in S.F.Nos.855 and 856 and the suit car track passes the survey No.850/8, 850/7 and 854/2. They state that they cannot refrain from using the track as they do not have another track besides the suit track. Lands in Survey No.850/8, 850/7 and 854/2 belongs to defendants 2 to 8. They are not letting the plaintiffs use the suit car track and have reduced the extent of the same. As per the revenue records, the suit track in Survey No.850/8 measures up to 6 to 8 meters and the suit track in Survey No.850/7 measures upto 0.20 hectares. The suit track starts from 2nd, 4th defendant's land. On 18.11.1991, the said defendants had planted a coconut tree on the suit car track. Defendant 1 had already encroached the track and was doing cultivation. The 2nd and 8th defendant have land in R.S.No.850. They have together reduced the extent of the track. The plaintiffs state that they have rights over the track and they pray for permanent injunction refraining the defendants from planting trees or encroaching the suit car track and they want the track to be divided as per the revenue records and hence the suit filed.

(c) The defendants 2 to 4 filed written statement and according to them, the plaintiffs attempted to extend the suit cart track, the 2nd to 4th defendants have also filed a suit for permanent injunction in O.S.No.628 of 1991 and interim injunction was also obtained. The defendants' state that they have never objected the plaintiffs from using the suit track and that the said track has been measuring for 6ft since generations and they specifically denied that Re survey classification was not true and correct and no notice nor enquiry was held in respect of the same. The defendants state that the plaintiffs relief of permanent injunction without seeking for declaration is not maintainable and hence the suit is liable to be dismissed.

6. The trial court framed appropriate issues in both the suits and after full fledged trial, by common judgment, given findings that the suit cart track runs in the patta property of the plaintiffs. As per the Advocate Commissioner's report in C-1 and C-2 in O.S.No.628 of 1991, the measurement of the suit cart track is 6 feet to 6 ½ feet only. As per Advocate Commissioner's report in C-3 to C-6 as per O.S.No.721/1991, the suit cart track measures greater than 6 feet. Suit cart track does not measure in accordance to the Revenue Records and hence does not match with the Advocate Commissioner's report. Revenue record shows that based on re-survey, the suit cart track is classified as "Nilaviyal Vandithadam". Since revenue record shows that the suit property as "Nilaviyal Vandithadam" the same has to be maintained and the other land owners are also allowed to use the cart track to reach their own lands. The plaintiffs in O.S.No.628 of 1991 did not deny the usage of the cart track to the extent of 6 feet. In such circumstances, it is not

feasible for the other land owners to the extent of 6 feet to use the suit property efficiently, as except bullock cart no other vehicles like tractor or lorries can pass through. Hence, minimum 15 feet is needed and accordingly only the cart track measurements are increased beyond 6 feet by the Revenue department by their Resurvey. The conclusion of the trial court is that the plaintiffs shall thus maintain the cart track as per the revenue records and shall not encroach the same for the sake of their convenience and directed the plaintiffs to remove the alleged encroachment from the land of the plaintiffs in O.S.628 of 1991.

7. The above findings of the trial court was confirmed by the lower appellate court in A.S.Nos. 118 and 119 of 1998.

8. As against the said findings, the present Second Appeals are filed. This court admitted the second appeals for considering the following question of law.

" Are the respondents/plaintiffs entitled to relief of mandatory injunction for alleged encroachment without prayer for mandatory injunction ?"

9. Heard the learned Senior counsel appearing for the appellants and the learned Senior counsel appearing for respondents 5 to 7 in S.A.1241 of 2000.

10. It is contended by the learned Senior counsel for the appellants that during the Re Survey classification, the alleged suit cart track was earmarked in appellants land without giving any notice to them and therefore, the same will not affect the appellants title. The respondents categorically admitted the title of the appellants over the suit property but claimed the cart track as common one as per the Re survey classification. In such circumstances, Re survey classification was not correct. At the time of Re survey classification, no notice was served on them nor any enquiry was conducted in respect of the same. Therefore, the alleged re survey classification done in the year 1991 will not affect the appellants title and the respondents cannot claim any right over the suit property. In this regard, the learned counsel for the appellants relied on the following citations:-

- (1) 1952 (1) MLJ 804 V.M.S.Kandaswamy Vs. The Province of Madras
- (2) 1974 (vol 87) LW 531 State of Madras Vs. Kasthuri Ammal.

11. It is also contended that in respect of re survey classification, no notice was served to the appellants and the said evidence was not disproved by the respondents. The evidence of D.W.3 Village Administrative Officer also go to

show that in respect of re survey, he did not know the details of notice to Muniyappa Gounder. The learned Senior counsel would submit that orders of re survey passed under Section 13 of Survey and Boundaries Act, 1923 without notice to appellants is not binding on the appellants.

12. The learned Senior counsel for the appellants also put forth his submissions that the lower appellate court ought to have accepted the additional documentary evidence produced by them with regard to Suit old S.No.403 which would show that S.No.850 does not contain any cart track as alleged by the respondents. The learned Senior counsel submits that the courts below without considering the vital aspect of issue involved in this case, dismissed the suit filed by the appellants. Hence, prayed to allow the Second Appeals.

13. Per contra, learned Senior counsel for the respondents argued that the respondents filed O.S.No.721 of 1991 against the appellants and others praying for grant of a decree for permanent injunction and mandatory injunction to restrain the defendants not to encroach the suit cart track and not to raise any crops, trees and not to construct any buildings and one another relief of mandatory injunction to remove the encroached portion in the suit cart track. Learned senior counsel would submit that R.S.No.855 and R.S.No.856 Jambai Village belongs the respondents. Suit cart track shown as "ACDEFGHIJK" in the plaint plan and it runs in R.S.Nos.850/8, 850/7, 854/2 from Jambai Village to Chinniyampalayam Road to eastern side and ends in vaikkal. This cart track is shown in the revenue records as Nilaviyal padhai (public road). The appellants reduced the width of cart track and encroached the cart track and raised coconut trees, paddy crops and hence the suit in O.S.No.721 of 1991 was filed. In the suit in O.S.No.721 of 1991, 2nd defendant/2nd appellant filed written statement which was adopted by other appellants stating that the appellants have not disturbed the user of the suit cart track. The appellants submission is that without seeking declaration, suit in O.S.No.721 of 1991 is not maintainable. According to them, there is no encroachment in the suit cart track and they never raised any crops, coconut trees and paddy in the above stated cart track.

14. The learned Senior counsel would submit that while the pleadings were taken up by both appellants and respondents in both suits in O.S.Nos.628 of 1991 and 721 of 1991, issues were framed by the trial court and both suits disposed of by the common judgment. The findings by the trial court is that in respect of width of 6 feet cart track, claim of the appellants was dismissed and permanent injunction was granted in favour of the respondents. The trial court found that the suit properties running in the patta lands of appellants is admitted by both sides. Ex.A.1 to Ex.A.6 would go to show that the suit cart track has width of 6 feet only. The trial court pointed out that Ex.B.1 sale deed, Ex.B.2 Chitta, Ex.B.3

Adangal, Ex.B.4 RSR Xerox and Ex.B.5 Field Map and deposition of D.Ws.1 , 2 and 4 would collectively show that cart track is 20 feet. But the plaintiffs in O.S.No.628 of 1991 reduced the width of cart track and encroached the suit cart track by raising crops and coconut trees. When the plaintiffs in O.S.No.628 of 1991 raised objections to the arguments of defendants that suit cart track is shown as "Nilaviyal Vandipadhai" in the revenue records, to find out the real facts, Advocate Commissioner was appointed who with the help of Surveyor and Village Administrative Officer measured and reports have been marked as Exs.C1 to C12. The reports and maps clearly pointed out the encroachment portion in the suit cart track. It is further submitted that the lower appellate court, while confirming the judgment passed in O.S.Nos.628 and 721 of 1991, held that the appellants objection regarding the dispute of width of cart track ought to have been raised before the revenue officers. The marking of additional evidence in R.S.Nos.403 with regard to width of cart track was rejected. The lower appellate court also found that there is an encroachment in the suit cart track.

15. The learned Senior counsel for the respondents would submit that the appellants contention with regard to resurvey proceedings are concerned, it is the allegation of the appellants that no notice was served on them. When the resurvey proceedings have been carried out by mutation of revenue records more particularly under Ex.B.4 FMB Plan, classifying the suit cart track as Nilaviyal Vandipadhai, when such classification having not been challenged even in the present proceedings, by way of declaration of their right, then such classification is binding on the appellants. The learned Senior counsel for the respondents also pointed out that the arguments raised by the appellants with regard to resurvey proceedings has been raised for the first time in the above Second appeals and it is not an issue either in the trial court or lower appellate court and not related to the substantial questions of law framed in these second appeals. The learned counsel relied on the following decision in support of his contentions:-

1.J.Jagadesh Vs. Tahsildar, Modakurichi Taluk and others [W.P.No.27153 of 2016 dated 25/01/2018.]

2.S.P.Rajamani Vs. State of Tamil Nadu and Others [W.P.No.30187 of 2017 dated 06.02.2018] 3. G.Ramaswamy Vs. R.Dasan [S.A.(MD).No.987 of 2009 dated 5.2.2020] 4. Palaniappa Gounder and ors vs. Pongianna Gounder and others [S.A.Nos.1994 and 1995 of 1999 dated 31.12.2020]

16. The learned Senior counsel for the respondents would strenuously contend that when the trial court has recorded a clear finding that the cart track is classified as Nilaviyal Padhai and the lower appellate court also confirmed the findings of the trial court, the issue raised by the appellants in these second appeals have no merits. In view of

the above position, the decisions relied on by the learned Senior counsel for the appellants do not have any application to the facts and circumstances of the case on hand.

17. Admittedly, the plaintiffs blocked the cart track and the trial court passed a direction to remove the said encroachment. In terms of the decisions cited by the learned Senior counsel for the respondents and on considering the judgment of the courts below, it is crystal clear that the trial court has recorded a clear finding that the pathway is classified as "Nilaviyal Padhai" in the revenue records and used by the defendants. The First Appellate Court also confirmed the said findings of the trial court. When the courts below have found that the suit pathway is classified as a pathway in revenue records, this court is of the view that cart track formed in patta land has been described as "Nilaviyal Padhai" in the Revenue records. Therefore, the plaintiffs shall maintain the cart track as per the revenue records but shall not encroach the same for the sake of their convenience and so the the courts below rightly directed the plaintiffs to remove the encroachment from the said land.

18. The subject matter of the suit property in S.F.Nos.850/5, 8, 9 and the suit car track passes the said patta land is not disputed by the respondents. Ex.A.1 to Ex.A.6 would go to show that the suit cart track has width of 6 feet only. The trial court pointed out that Ex.B.1 sale deed, Ex.B.2 Chitta, Ex.B.3 Adangal, Ex.B.4 RSR Xerox and Ex.B.5 Field Map and deposition of D.Ws.1 , 2 and 4 would collectively show that cart track is 20 feet. Ex.D.3, 4 and 5 would make it clear that it has width of 6 feet and it is Nilaviyal padhai. The purpose of classifying such pathway in Revenue records is for public usage and therefore, even though it is admitted that the suit properties running in the patta lands of appellants, allowed the plaintiffs to maintain the cart track and further directed the plaintiffs to remove the encroachment, which finding and conclusion needs no interference.

19. In the light of the above, this court do not find any infirmity in the findings of the courts below. In the result, the substantial question of law raised in the above Second Appeals, is answered against the appellants. Accordingly Second Appeals fail and the same are dismissed. The decree and judgment of the lower appellate court confirming the decree and judgment of the trial court is hereby confirmed. No costs.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

nvsri

To

- 1.The Subordinate Judge, Bhavani, Erode District,
- 2.The Additional District Munsif, Bhavani, Erode District.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to M/s.Zeenath Begum, Advocate SR. No. 32656

+1cc to M/s.P.T.Ramadevi, Advocate SR. No. 32420

SECOND APPEAL Nos.1241 and 1242 of 2000

SRII (CO)

PR (15/07/2022)