
(2011) 08 MAD CK 0121
In the Madras High Court
Case No : S.A. No. 1433 of 1995

Ayyavu Asari and Others

APPELLANT

Vs

Subbu Asari (deceased) and Others

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (2011) 08 MAD CK 0121

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : M.V. Krishnan, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—The Appellants/Defendants 1, 3, 4, 6 and 7 have projected the Second Appeal before this Court as against the

judgment and Decree dated 06.02.1995 in A.S. No. 108 of 1992 passed by the Learned Subordinate Judge, Tiruvallur.

2. Before the trial Court, in the main suit, on the side of the 1st Respondent/Plaintiff (later deceased), witnesses P.W.1 and P.W.2 have been

examined and Exs.A.1 to A.13 have been marked. On the side of the Appellants/Defendants 1, 3, 4, 6 and 7 and the 2nd Respondent/ 5th

Defendant, witnesses D.W.1 and D.W.2 have been examined and Ex.B.1 has been marked.

3. The trial Court, after contest and upon appreciation of oral and available documentary evidence on record, in the judgment in O.S. No. 786 of

1973 filed by the 1st Respondent/Plaintiff, has, inter alia, held that there is no clear evidence on the side of the 1st Respondent/ Plaintiff as to the

possession of the Plaint schedule properties and further that there is no clear

evidence on the side of 1st Respondent/ Plaintiff that Naina Achari lived jointly with his brothers. Moreover, there is also no clear evidence as to the partition alleged by the 1st Respondent/Plaintiff and that the Sale Deed dated 22.05.1958 and 21.3.1959 are not true and valid. That apart, the trial Court has also observed that the 1st Respondent /Plaintiff cannot base his claim with regard to the property covered under Ex.A.3-Letter dated 22.05.1958 executed by Ramadoss Achari in favour of Kannaiyuram Achari and Ex.A.4-Letter dated 21.03.1959 executed by Mottai Achari and others in favour of Kannaiyuram in view of his purchase under Ex.A.2-Sale Deed dated 24.07.1972. Added further, it has opined that even though Ex.A.2-Sale Deed 24.02.1972 is a true transaction, the same is not valid, since the 1st Respondent/Plaintiff cannot derive any title to the property covered as per Ex.A.3-Letter dated 22.05.1958 and Ex.A.4-Letter dated 21.03.1959. Consequently, the trial Court has come to the conclusion that the 1st Respondent/ Plaintiff is not entitled to get the relief of partition or declaration and possession as prayed for in the Plaint and dismissed the suit, directing the parties to bear their own costs.

4. Felling aggrieved against the judgment and Decree of the trial Court dated 19.12.1980 in O.S. No. 786 of 1973, the 1st Respondent /Plaintiff

(later deceased) has preferred the A.S. No. 108 of 1992 before the First Appellate Court viz., Learned Subordinate Judge, Tiruvallur.

5. The First Appellate Court viz., the Learned Subordinate Judge, Tiruvallur, while passing the judgment in A.S. No. 108 of 1992 dated

06.02.1995, has resultantly allowed the Appeal (leaving the parties to bear their own costs) in granting a decree in favour of the 1st

Respondent/Plaintiff (later deceased) declaring his title in respect of item 4 of the suit property. Also, it granted the relief of permanent injunction in

favour of the 1st Respondent/Plaintiff against the Defendants and also passed a preliminary decree for partition and separate possession of the 1st

Respondent/Plaintiff's share in respect of item 5 of the suit property and in respect of the 1st Respondent/1st Plaintiff's 1/4th share of item 1 of the

suit property, besides granting a Decree for mesne profits in respect of item 1 of the suit property alone from the date of the suit etc. Further, the

1st Respondent/Plaintiff has been given the liberty to apply to the Court for

appointment of a Commissioner for effecting division of his 1/4th share

in item 1 and 5 and further to ascertain the mesne profits in respect of item 1.

6. The Appellants/Defendants 1, 3, 4, 5, 6 and 7 have preferred the Second Appeal before this Court, being aggrieved against the judgment and

Decree dated 06.02.1995 in A.S. No. 108 of 1992 in regard to the declaration of title of the 1st Respondent/Plaintiff in respect of 4th item of the

suit property and also as regards the grant of permanent injunction in favour of the 1st Respondent/Plaintiff etc.

7. At the time of admission of the Second Appeal, this Court has framed the following Substantial Question of Law:

Whether the Learned Subordinate Judge erred in declaring the title of the Plaintiff when he had failed to establish that his Vendor had any title or

right to the suit properties?

The Contentions, Discussions and Finding on Point:-

8. The Learned Counsel for the Appellants/Defendants 1, 3, 4, 6 and 7 submits that the First Appellate Court has failed to appreciate that the

vendor of the 1st Respondent/Plaintiff (later deceased) has no title and possession of items No. 3 and 4 of the suit schedule property to convey to

the 1st Respondent/Plaintiff.

9. It is the contention of the Learned Counsel for the Appellants/ Defendants 1, 3, 4, 6 and 7 that the trial Court has failed to take note of the fact

that Naina Achari and his brothers have executed a registered mortgage deed in favour of Chellappa Chetty which is binding on the family and that

the 1st Appellant/1st Defendant has discharged the debt and the heirs of Natesa Achari has no right to inherit the property without reference to the

mortgage discharged by the Defendants 1 and 2.

10. Continuing further, it is the plea of the Appellants that the First Appellate Court should have held that the Sale Deed in favour of the 1st

Respondent/Plaintiff is not a true and a valid one. Moreover, the First Appellate Court ought to have upheld the title of the Defendants as per

Ex.A.7-Copy of Sale Deed dated 1.7.1970 which has been proceeded by an agreement dated 06.01.1968.

11. It is the stand of the Appellants that the 1st Respondent has constructed a pucca masonry tiled house 30 years ago on item No. 5 and if his

ownership of possession is disturbed, then, it will cause irreparable damage and hardship, which has not been taken into account at the time of passing of the judgment in Appeal.

12. It is the further submission of the Learned Counsel for the Appellants that the First Appellate Court has failed to appreciate that Kuppammal

has received the entire consideration from the 1st Defendant on the date of agreement of sale dated 06.01.1968 followed by a Sale Deed-Ex.A.7

dated 12.7.1970. Continuing further, the First Appellate Court has failed to consider that the agreement in favour of the 1st Defendant by

Kuppammal has been earlier to Ex.A.5-Sale Deed dated 15.07.1970 in favour of the 1st Respondent/Plaintiff.

13. According to the Learned Counsel for the Appellants, the First Appellate Court should have held that the 1st Respondent/Plaintiff's vendor

Kannaiyuram has no title to the suit properties.

14. The Learned Counsel for the Appellants submits that there is no evident to establish that Naina Achari has been the manager of a joint family

and that he has been a member of a joint family, with his brothers. Also, the 1st Respondent/Plaintiff has failed to establish that his case of partition

between the brothers Naina Achari, Appasami Achari, Kandasami Achari and Duraisami Achari 30 years before the suit.

15. The Learned Counsel for the Appellants contends that the 1st Respondent/Plaintiff has not obtained any title to the suit property as per Ex.A.1

and A.2-Sale Deeds dated 06.01.1926 and 24.07.1972 in view of the fact that his vendors themselves have no title to the property.

16. The Learned Counsel for the Appellants submits that no reliance can be placed on Exs.A.3, A.4-Sale Letters and in any event, they cannot be

looked into, for want of registration.

17. The Learned Counsel for the Appellants projects an argument that the First Appellate Court has failed to appreciate that the evidence of

P.W.1 does not show that each member of the family of Singara Achari and Naina Achari contributed to the purchase of property covered as per

Ex.A.1-Sale Deed dated 06.01.1926.

18. The Learned Counsel for the Appellants points out that the First Appellate Court should have confirmed the finding of fact based on evidence

recorded by the trial Court to the effect that there is no clear evidence on the

side of the 1st Respondent/Plaintiff to accept the division of properties between Naina Achari and Singara Achari.

19. It is the case of the Appellants that Rathnammal, who has left the family and living with the stranger after the death of Natesa Achari has no right to convey the suit properties to the 1st Respondent/ Plaintiff's vendor.

20. The Learned Counsel for the Appellants submits that the First Appellate Court should have seen that the entire second item has been given to Naina Achari and that Appasami Achari has been given the Kachur property and also that the other brothers Kandasami Achari, Duraisami Achari have been given the other properties.

21. It is useful to refer to the evidence of P.W.1, P.W.2, D.W.1 and D.W.2 for better appreciation of the case.

22.P.W.1 (1st Respondent/Plaintiff), in his evidence, has deposed that the vacant plot in the suit property belongs to his father Chinnayya Achari and his father's two brothers are Singara Achari, Kanniyappa Achari and that the said Singara Achari expired and his father has four sons and further that he is the second son and his father and his uncle have died and further his uncle has one son.

23. It is the further evidence of P.W.1 that initially his father and uncle have remained as a joint family and that he purchased the properties from

Kannaiyuram Achari and Appasami Achari is the father of Kannaiyuram Achari and Appasami's Achari has four brothers viz., Naina Achari,

Appasami Achari, Kandasami Achari, Mottai Achari and all of them are not alive now and Naina Achari has four sons viz., Natesa Achari,

Appavu Achari, Subramaniya Achari, Thangavelu Achari. Further, the said Natesa Achari has died, but his wife and child are alive and the

daughter's name is Kuppammal and the Subramani's daughter has been arrayed as 3rd Defendant in the suit and Subramani Achari's son

Krishnasami has been added as 4th Defendant in the suit and after the suit, Krishnan has expired and that Naina Achari and his brothers have

remained as joint family at the initial stage and the suit village is the ancestral village and that they possessed the ancestral property.

24. The evidence of P.W.1 is to the effect that he has shown in the suit, the ancestral land obtained by the four persons and that Singara Achari

and Naina Achari and his brothers have jointly purchased the properties and at

the time of purchase made by the Ayyammal, the family has remained as a joint family and that Singara Achari and his brothers have remained as a joint family and that when Naina Achari has remained as a joint family. At that time, the family has been looked after by the Naina Achari and that Singara Achari has also looked after the family and two persons have purchased the property jointly and the documents are in their name and that after purchase made by the Ayyammal, the balance have been divided by them equally and at that time for Naina Achari family the lower portion and for Singara Achari family the upper portion have come to them respectively. The portion 30 x 24 feet extent has come to Naina Achari for which he has found a boundary and the original sale deed purchased by them has been misplaced and therefore, he has filed the Registration Copy of Sale Deed-Ex.A.1 dated 06.01.1926 and that the ancestral land, which has been purchased, has been enjoyed by them treating it as a common one and later, the four brothers have partitioned the said plot and that Naina Achari has obtained the upper portion of the land and Appasami Achari got the lower portion of the land situated next to that of Naina Achari. The other lower portion has been obtained by Kandasami Achari and the lower lost portion has been allotted to the share of Mottai Achari. Also, they have partitioned the land which has been obtained in a joint manner.

25. P.W.1 has gone to the extent of deposing that after sharing the upper and lower portion on the northern side, a lane of 3 feet has been formed and kept for the 1st Respondent/Plaintiff and further, the 3 feet lane has been apportioned for the purpose of transport and on the northern side to that of the ancestral property, the Subramaniya Achari land is situated and after partitioned, the respective portions have been enjoyed by the respective sharers and that after the death of Appasami, his property has been enjoyed by the Kannaiyuram.

26. P.W.1 has also deposed that Kannaiyuram Achari has purchased the share/portion near the portion of Appasami which has come to the share of Kandasami Achari and from the date of purchase, he has been in enjoyment of the same and even the eastern share/portion of Mottai Achari has been purchased by Kannaiyuram and from the date of purchase, Kannaiyuram Achari has been in enjoyment and in all, he has been in

enjoyment of 3/4th share and two shares have been purchased by means of a letter which is in possession of Kannaiyuram Achari and at the time

of filing of the suit, he has given to him and that the said letter has been given to him at the time of purchase and that Kannaiyuram Achari has sold

his portion of ancestral land and that Ex.A.2 is the Sale Deed dated 24.07.1972 executed by Kannaiyuram Achari in his favour and from the date

of Ex.A.2-Sale Deed, he has been in possession of the properties and the properties which he has purchased from Kannaiyuram Achari through

Ex.A.2 has been shown as item Nos. 3 and 4 in the suit and the letter is Ex.A.3 dated 22.05.1958 and Ex.A.4 is the letter dated 21.03.1959.

27. It is the further evidence of P.W.1 that in item 3 of the suit property, the Defendants have put hut and the 4th item, he is in possession and after

putting the hut 10 days later he has filed the case and that Appavu Achari's brother is Natesa Achari and Natesa Achari wife is Rathinammal and

that Natesa Achari has no son but he has two daughters and that Natesa Achari expired and for him Rathinammal and Kuppammal are the heirs.

He has purchased the property in the name of Rathinammal and Kuppammal through Ex.A.5-Registered Sale Deed dated 15.05.1970.

28. In his cross examination P.W.1 has deposed that he has prayed for the relief of directing the possession of properties purchased by him from

Rathinammal and Kuppammal and he has prayed for the relief of declaration, the 3rd item of the suit property belongs to him and in respect of 4th

item, he has sought the relief of injunction.

29.P.W.1 also has gone to the extent of deposing in his evidence to the effect that he has seen Singara Achari who died 15 years ago and that he

has not seen Naina Achari and he has not seen the original of Ex.A.1-Sale Deed and that Kanniyappa Achari belongs to Pondawakkam village

and that he has no lands now at Pondawakkam and the lands have been sold 7 or 8 years before and that Kanniyappa Achari and his elder

brother and younger brother have got themselves divided well before, he has come to know about the worldly affairs and that for 1 and 2

Defendants, there are no cultivation lands and that Kannaiyuram Achari has been in possession of maniyam land at Pondawakkam and after the

difficult sustenance, the maniyam land has been sold and when Kannaiyuram has been alive.

30.P.W.1, in his evidence, has further added that he has not issued any notice prior to the filing of the suit and that 10 years have elapsed from the date of his purchase from Rathinammal and after his purchase, they have divided and that the land has not been divided and house alone has been divided and constructed by the four sons of Ayyavu Achari and among themselves they have not divided and that Rathinammal is the brother's wife of Ayyavu Achari and at the time of his purchase, they have not divided and that he has not asked his brothers.

31. P.W.2, in his evidence, has stated that Appasami Achari is his father and along with father Jaana Achari, Kandasami Achari, Mottai Achari are

his brothers and all four of them initially lived as a joint family and for them in Pondawakkam they possessed two ancestral lands and another land

is a purchased one and that Subba Achari's father is Singara Achari and after him, his Chinnayya Achari and Singara Achari and his brothers

originally they remained as a joint family and the land purchased for the Duraisami Achari family has been purchased by Singara Achari. It is the

further evidence of P.W.2 that the family of brothers of Kannan and Durai Achari family jointly purchased the said land and at that time, Durai

Achari has acted as a head of the family and each one of them has been in enjoyment after purchasing the same jointly and that for Durai Achari

the lower down portion of the land has come to his share from and out of the joint purchase made and the upper portion of the land has come to

Singara Achari share and that Duraisami Achari family originally has been in joint one and till such time, they lived as an one family, later the lands

were partitioned and that the two lands have also been partitioned as co-sharers before 42 years ago and that in the two lands the upper end of the

portion has fallen to the share of Durai Achari, the next lower down portion has fallen to Appasami Achari, the next lower end portion has come to

Mottai Achari and that from the date of partition, each one of them has been in enjoyment of the property. At the time of property being divided

his father has been at Pondawakkam and even subsequent to the partition, his father has remained at Pondawakkam and later in the family some

defects have arisen and he has gone to Chakru and in that place he has been living with his family and from the date of partition, the property in

Kachur has been enjoyed by the Appasami and that Appasami Achari and his mother have expired and after his mother's death his father is also

expired and for his father except himself there is no legal heir and his father has purchased other properties, other than the properties which has

fallen to the share of his father and his father has enjoyed the properties till his death and after his father's death, he has enjoyed the same.

32. P.W.2, in his cross examination, has deposed that the Mottai Achari's portion of property is situated on the eastern portion of the property of

Kandasami Achari and that he has purchased the share of Mottai Achari for a sum of Rs. 50/- through Ex.A.4-Sale Letter and that the property

has been handed over to him and ever since the date, he has been in enjoyment of the property and that after purchase of the property jointly,

three shares have come to him and he has been in enjoyment of the three shares of the property. Furthermore, in the land belonging to elders, he

has been in enjoyment of the land which has come to his father after the death of his father and that the land which has come from elders and the

land which he has purchased when he has been ready to sell the same at that time Ayyavu Achari demanded the sale of the same. Also, he asked

Rs. 300/- as sale price, but Ayyavu Achari demanded the property for a very low amount and since the transaction has not been completed, later

Appasami asked for the same for a sum of Rs. 300/- and he got the sale executed. Ex.A.2 is the Sale Deed dated 24.07.1972 which he has

executed in favour of Appasami Achari and that after selling the properties he has handed over Exs.A.3, A.4-Letters and from that date onwards,

the property has been in enjoyment of Appasami Achari and before that, those properties have been in his enjoyment.

33.P.W.2 goes on to add in his evidence that Appasami after partitioned has purchased the properties and in that properties his father's other

brothers have no right and he has sold the property purchased enclosing of his three shares and even in the ancestral land and the property which

has come to his share have been sold to the Plaintiff.

34. Also, P.W.2 has deposed that he is in possession of the document through which his father has purchased the property and that after selling the

some extent, the balance 35 feet east-west is available on the western side and it is not correct to state that in the suit village they do not possess

the ancestral property.

35. D.W.1 (1st Defendant), in his evidence, has deposed that his brother is the

2nd Defendant and that the 3rd Defendant is the wife of

Subramaniya Achari and the 4th Defendant is the daughter of Subramaniya Achari and that he has also expired and that his elder brother Natesa

Achari has also expired and Natesa Achari's wife is Rathinammal and Kuppammal is the daughter born to Natesa Achari and Rathinammal and he

has given in marriage the daughter of Natesa Achari, Kuppammal and that his wife has gone out side.

36. Further, it is the evidence of D.W.1 that his father's name is Naina Achari and along with his father, there are four persons in their father's

family and his father's brother Appasami Achari has been living at Kachur and his father and his brothers during the grandfather time has separated

themselves and Appasami's son is Kannaiyuram and P.W.1 has never resided at Pondawakkam and it is incorrect to state that his father and his

brothers have lived as one family.

37. D.W.1, in his cross examination, has deposed that Singara Achari has one female issue by name, Sengammal and that he has no male issue and

further that Singara Achari's younger brother is Chinnayya Achari and for Chinnayya Achari, there are four male children and one son of

Chinnayya Achari is the Plaintiff-Subba Achari and that along with Subba Achari, three persons, who have been born, are alive and Kanniyappa

Achari is the another brother of Singara Achari and that Kanniyappa Achari has expired and his son is Arumugam.

38. The evidence of D.W.1 goes to the effect that Naina Achari and Singara Achari have purchased the property and it is incorrect to state that in

the property purchased by Naina Achari and Singara Achari, Naina Achari's brothers have got a share and also at the time of Ex.A.1-Sale Deed

dated 06.01.1926, Naina Achari and his brothers have remained as different families and it is incorrect to state that in the property purchased by

Naina Achari and Singara Achari, Singara Achari has been allotted the upper portion of the property and the lower down portion has been given

to Singara Achari and in Ex.A.1 document east-west 63 feet property has not been divided as upper half and lower half at any point of time and

apart from the property purchased by Naina Achari and Singara Achari, other items of property and 2nd item of property have not been divided

and in the elders property, Appasami Achari has got the right and it is incorrect

to state that Kannaiyuram has purchased the property from Ramasamy Achari, Kandasamy Achari and others.

39. D.W.2, in his evidence, has deposed that he is residing at Pondawakkam and his father's name is Kandappa Achari and Durai Achari,

Appasami Achari and his brothers are born to his father and his father's younger brother is Mottai Achari and that Kannaiyuram is the son of

Appasami. Moreover, he knows about the property of Durai Achari and Singara Achari and in that property, except Singara Achari and Durai

Achari, no one has got any right and the brothers of Durai Achari has no right in the property purchased as aforesaid and Singara Achari's two

brothers are Singara Achari and Kanniyappa Achari and in the property purchased by Singara Achari, they do not have any right.

40. D.W.2 has also deposed, in his evidence, that the name of female daughter of Singara Achari is Sengammal and Chinnayya Achari's sons are

Panjappa Achari, Subba Achari (Plaintiff), Rajagopal Achari, Dhanapal and in the property purchased by Singara Achari, except his brother, no

one has got any right and the property purchased by Singara Achari and Durai Achari is situated on the eastern side of Kammala Street.

41. D.W.2, in his cross examination, has deposed that his brother has got married 10 years before and he and his brothers have divided the

ancestral property 15 years ago and in Pondawakkam village his father possessed one plot and the said plot of land has been inherited by them

after the death of the father and the said land has been enjoyed by his three brothers and that their land has been mortgaged for the marriage of his

brother and after raising a mortgage, they received the money from Kamalammal. It is the further evidence of D.W.2 that whether the mortgage is

a possessory mortgage or by deposit of title deeds he does not know and his brother only mortgaged the land and they do not possess a record

for dividing the property among his brothers.

42. It is the evidence of D.W.2 that Subba Achari and Singara Achari have put the hut in the Durai Achari's land for which an objection has been

raised by Ayyavu Achari and the hut has been put one month before filing of the present suit and further that the hut has been put before 30 years

and that Subba Achari has been enjoying the hut ever since after putting up the same and on the southern side of the hut, the place purchased by

Muniammal is there. Also, D.W.2 has stated that it is incorrect to state that on the upper portion, the Singara Achari has got a right and on the western side of the hut put up by Subba Achari, Singara Achari has got a land and on the eastern side of the hut, there is no land and that Singara Achari and Durai Achari are related to each other and the land that has come to them has been purchased from Kuppachari and after selling the same, they have gone to Puthur. Further, this fact known to him after being informed by the D.W.1 10 years ago and that Durai Achari and Appaachari have jointly purchased the land sold by Muniammal and that the land sold to Chockalingam Chettiar and the land that has fallen to Muniammal has been purchased jointly by Durai Achari and Appasami Achari and he does not know the year of purchase and after the said joint purchase, the upper half portion has been taken by Durai Achari in writing and the lower portion has been taken by Appasami Achari and in between the two properties on the northern side. Also, it is correct to state that there is an extent of 63 feet and it is in enjoyment of Singara Achari and Durai Achari and they are not enjoying the same in common and apart from the above joint purchase of properties, other properties have not been divided.

43. Moreover, it is the evidence of D.W.2 that Singara Achari and Durai Achari have purchased two lands jointly and they have not divided those two lands and the extent of land jointly purchased by them is measuring 50 feet by 50 feet and the said property remains vacant and no one is enjoying the same.

44. Proceeding further, it is the evidence of D.W.2 that he has started residing 20 years before to the northern side portion of the house of Subramaniya Achari and he has been residing separately for the last 20 years and he and his elder brothers and younger brothers are living separately and they remained as a joint family and 5 years before they have partitioned themselves and in the suit property, they do not have any right and they have not divided the portion of Singara Achari and Durai Achari and in their property/share, they do not have a right. D.W.2 has further deposed that 10 years have elapsed after the death of Natesa Achari and he died when he has remained in a joint family and after the death of Natesa Achari, Ayyavu Achari has looked after the family and Natesa Achari

died four months after the death of Subramania Achari and all the property has been enjoyed by Ayyavu Achari for a loan and the loan amount of Rs. 1,500/- to be paid by Natesa Achari is to be paid by Ayyavu Achari.

45. In the Complaint filed by the 1st Respondent/Plaintiff (later deceased), the following reliefs have been sought for:

(a) for a declaration of Plaintiff's title to suit item 4 and for a permanent injunction restraining the Defendants from interfering with the Plaintiff's

possession of suit item 4;

(b) for partition and separate possession of Plaintiff's 1/4th share in suit item 5;

(c) for a declaration of Plaintiff's title to suit item 3 and for recovery of vacant possession of the same and profits from the date of suit; or in the

alternative for partition and separate possession of 1/4th share in suit item 1 and for profits from the date of suit; and (d) for recovery of costs of

this suit.

46. In the Written Statement filed by the Defendants 1 and 2, it is stated that it is not possible to identify the properties as per the boundaries

furnished and that the purchase by Naina Achari as per Sale Deed dated 06.01.1926 has not been for his brothers also and moreover, the said

Naina Achari has not been the Manager and he has not remained joint with his brothers and also that there has been no division has made mention

of in para 3 of the Complaint.

47. Furthermore, in the Written Statement of Defendants 1 and 2, it is mentioned that Appasami Achari has been a resident of Kachur and

enjoyed the house site and lands that he inherited from his father in his own right and enjoyed the rights of village service in that village and the said

Appasami Achari has no right in the house sites in Pondawakkam village. Apart from that, if Kannaiyuram Achari son of Appasami Achari is to

claim any share in Pondawakkam sites, he must give shares to Defendants 1 to 4 in properties that he has in Kachur. Appasami Achari is not

entitled to any share in item 2 and he has not been given any share. Kannaiyuram has not inherited any right to any portion of item 2 or item 4.

Equally, his father is not entitled to any portion of item 1 and Kannaiyuram has not inherited any share in item 1. The Defendants 1 and 2 are

residing in a brick built house in item 2 for more than 15 years in their own right.

48. The sale letters are not a true and valid one. Kannaiyuram is not in enjoyment of any portion of item 1 of the property, even his alleged vendors have not been in enjoyment of any such portion. Hence, the claim of adverse possession is invalid. Kannaiyuram has been a resident of Kachur for the past nearly 50 years.

49. In the Written Statement of Defendants 1 and 2, a stand is taken to the effect that the sales relied upon in para 6 of the Plaint has been

disputed and it is their case that the vendor has no right or possession to convey the property to the Plaintiff (later deceased) and further,

Kannaiyuram Achari has no title and possession to items 3 and 4 and that the Defendants 1 and 2 have not tried to purchase them from

Kannaiyuram. Also, there has been no trespass by Defendants 1 and 2.

50. The 1st Defendant has discharged the mortgage debt and the heirs of Natesa Achari viz., his wife and daughters cannot alienate the property

without reference to the mortgage. The registered mortgage to Chellappa Chetti by Natesa Achari and his three brothers is binding on the family.

The purported sale is not admitted. The Plaintiff must file a suit for general partition including Kannaiyuram and his properties, if the Plaintiff claims partition.

51. In the Plaint, the 1st Respondent/Plaintiff (deceased) has stated that the suit item 1 along with the property west of it has been purchased by

one Singara Achari and 1 and 2 Defendants" father Naina Achari as per Sale Deed dated 06.01.1926. The said Naina Achari purchased it with

the joint family funds for and on behalf of the joint family consisting of himself, and his brothers, he being the Manager of the joint family, so also

Singara Achari purchased for and on behalf of the joint family comprising of himself and his brothers Chinnayya Achari and another. In the division

of the property comprised in the Sale Deed dated 06.01.1926, the joint family of the four brothers got the suit item 1, and the joint family of

Singara Achari and his brothers got the property west of suit item No. 1. Suit item 2 has been the ancestral property of Naina Achari and his brothers.

52. It is the case of the 1st Respondent/Plaintiff (deceased) that the suit items 1 and 2 and other properties belonged to the joint family comprising

of Naina Achari, Appasami Achari, Kandasami Achari, Duraisami Achari alias Mottai Achari and that in the division between the said four

brothers of their joint family properties, more than 30 years ago, in item No. 1, Naina Achari got the western 1/4th, Appasami Achari the next

eastern 1/4th, Kandasami Achari the next eastern and Duraisami Asari the eastern most and in item 2, Appasami Achari got suit item 4 for his

share (item 4 is the 2nd 1/4th share in suit item 2 from the west) and Naina Achari suit item 5 (the western most 1/4th of suit item 2) and from the

date of partition, the respective sharers have been in exclusive possession and enjoyment of their respective allotted sharers.

53. Also, in the Complaint, it is mentioned that after the death of Appasami Achari his only son Kannaiyuram Achari is entitled to the suit item 4

exclusively and the allotted 1/4th share of Appasami Achari in item 1 Kannaiyuram Achari is entitled to the allotted shares of Kandasami Achari

and Duraisami Achari in item 1 pursuant to the purchases from Kandasami Achari for himself and as guardian of his minor son and his major son

Ramados Achari on 02.05.1958 for Rs. 20/- , and from Mottai Achari @ Duraisami Achari on 21.03.1959 for Rs. 50/- . The above said

purchases have been evidenced by sale letters executed by the respective vendees in favour of Kannaiyuram Achari and that the said Kannaiyuram

has been in exclusive possession and enjoyment of the respective purchased portions from the date of purchase and in any event, has prescribed

title thereto. Accordingly, the said Kannaiyuram is exclusively entitled to the eastern 3/4th item 1, which is described as suit item 3.

54. Besides the above, it is stated in the Complaint that the 1st Respondent/Plaintiff (later deceased) has purchased the suit items 3 and 4 from

Kannaiyuram Achari son of Appasami Achari, as per Sale Deed dated 24.07.1972 for an amount of Rs. 300/- and from that date of sale, the

Plaintiff has been in possession of suit item Nos. 3 and 4 and that the Defendants have no manner of right in them. The Defendants 1 and 2 have

trespassed into the suit item No. 3 about 10 days back and have put up constructions. The 1st Respondent/Plaintiff (later deceased) has been in

possession of suit item 4 which is a vacant site. The Defendants are threatening to interfere with the possession of the 1st Respondent/Plaintiff in

respect of suit item 4 and further, they are disputing the title of the 1st Respondent/Plaintiff (later deceased) for suit item Nos. 3 and 4.

55. According to the 1st Respondent/Plaintiff (later deceased), even if the suit item 1 is held to be the separate property of Naina Achari, the 1st

Respondent/Plaintiff having purchased 1/4th share in items 1 and 5 from Naina Achari's son Natesa Achari's widow Rathinammal and her

daughter Kuppammal under registered Sale Deed dated 15.05.1970, he is entitled to 1/4th share in suit item and for partition and separate

possession of his 1/4th share in suit item 1 and 5. The Defendants are disputing the title of 1st Respondent/Plaintiff to any share in suit items 1 and

5 and have excluded the Plaintiff from possession. The 1st Defendant has put up a construction in item 5 about 6 years ago and the 1st

Respondent/Plaintiff does not claim any interest in the same. The 1st Respondent/Plaintiff has purchased the items as per the Sale Deed dated

15.05.1970 on the representation of the vendees about the ownership.

56. The trial Court has come to a firm conclusion, while dismissing the main suit by observing that the 1st Respondent/Plaintiff (later deceased) has

not clearly proved the division of the property covered as per Ex.A.1-Sale Deed dated 06.01.1926 between Naina Achari and Singara Achari.

Also, the trial Court has opined that there is no clear evidence on the side on the side of the 1st Respondent/Plaintiff that the division of suit item

has fallen to the share of Naina Achari. Moreover, the trial Court has also observed that if at all the Plaintiff has got any right to item 5 and also

1/4th share in item No. 1 in view of his purchase under Ex.A.5-Registered Sale Deed dated 15.05.1970, it is for him to file a separate suit for

partition impleading the Kanniyuram Achari and his properties.

57. Furthermore, the trial Court has also concluded, in its judgment in the Suit, that the purchase as per Ex.A.1-Sale Deed dated 06.01.1926 has

not been for Naina Achari and his brothers and also it opined that there is no clear evidence on the side of the 1st Respondent /Plaintiff that Naina

Achari live jointly with his brothers and there is also no clear evidence as to the partition alleged by the 1st Respondent /Plaintiff.

58. As a matter of fact, the trial Court has held that Exs.A.3 and A.4-Letters dated 22.05.1958 and 21.03.1959 are not true and valid and as

such, the 1st Respondent/Plaintiff cannot lay his claim in regard to the property covered under Exs.A.3 and A.4-Letters, as referred to supra, in

lieu of his purchase as per Ex.A.2-Sale Deed dated 24.07.1972. The trial Court

has also gone to the extent of holding that even though Ex.A.2-

Sale Deed dated 24.07.1972 is a true transaction, it is not a valid one, since the 1st Respondent/Plaintiff cannot derive any title to the property

covered as per Exs.A.3 and A.4-Letters dated 22.05.1958 and 21.03.1959.

59. As regards the possession of Plaint Schedule properties, the trial Court has also observed that there is no clear evidence on the side of the 1st

Respondent/Plaintiff. In short, the trial Court has dismissed the Suit filed by the 1st Respondent/Plaintiff, by holding that he is not entitled to claim

the relief of Partition or Declaration and Possession as prayed for him in the Plaint.

60. It is to be noted that Registration is not a requisite factor in regard to the admissibility of the documents executed before 01.01.1865 although

they may be of the characteristics of documents which under the subsequent enactments are compulsorily registrable as per decision *Tiru Mala V.*

Lakshmi, ILR 2 Mad. 147. Likewise, the unregistered documents, executed at a time when the law did not require them to get it registered, is

admissible in evidence despite their non-registration as per decision *Ram Coomar Singh V. Kishori*, ILR 9 Cal. 68. Indeed, the admissibility of a

document in a suit is governed by the law as it exists when the suit is filed as per decision *Gandamal V. Uttamchand*, AIR 1933 Lah. 1038 at page

1039. Whether a document is admissible in evidence or not depends upon the nature and contents of the certain document and also based on the

facts and circumstances of a given case. The nomenclature of a document is not a decisive factor. The moot question is whether the document by

itself creates or extinguishes rights in an immovable property worth more than Rs. 100/- is required to be registered or not. The purpose of the

Registration Act is to enable the individuals to find out whether any particular item of property, with which they may be connected or concerned

with, has been made subject to certain legal requirement. The other aim is to grant solemnity of form and legal importance to certain classes of

documents by directing that they shall be registered. Also, the other purpose is to perpetuate the documents which may later be of legal

significance. However, the general aim is to place on record somewhere, where the individuals can see the record and enquire, what the particulars

are and in regard to the land is concerned what obligations exist as regards the

same. The object of registration is to prevent fraud also as per decision Bharat Indu V. Hakim Mohamand Hamid Ali Khan, AIR 1921 P.C. 93.

61. When Exs.A.3 and A.4 ? Letters refer to the sale of property certainly the First Appellate Court ought to have gone into the aspect as to

whether those documents can be looked into in the absence of any registration as required under the Indian Registration Act. However, the

requirement of registration or otherwise has not been adverted to by the First Appellate Court in its judgment in A.S. No. 108 of 1992 dated

06.02.1995. No steps have been taken by the 1st Respondent/Plaintiff (later deceased) in regard to the appointment of an Advocate

Commissioner either to locate or identify the suit properties. When the 1st Respondent/Plaintiff has not clearly established the identity of suit

properties.

62.A perusal of Ex.A.9-Lawyer's Notice addressed to Ayyavu Achari, Thangavel Achari and Bala Achari does not refer to item 4 of the suit

properties. It is the case of the Appellants that item 4 of the suit properties together with a remaining eastern portion item 2 have been in

possession and enjoyment of the 1st Defendant's family which has not been taken into account by the First Appellate Court.

63.A crucial question that arises for one's rumination is that whether the suit for partial partition is maintainable for want of impleading all necessary

parties to the suit? In the Written Statement filed by Defendants 1 and 2, a categorical stand has been taken that the 1st Respondent/Plaintiff

should file a suit for general partition including Kannaiyuram and his properties, if he claims partition.

64. The Learned Counsel for the Appellants cites the decision of Hon''ble Supreme Court in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain

Singh and Others, to the effect that "the First Appellate Court should not interfere with the finding of fact rendered by the trial Court." The

observations of the Hon''ble Supreme Court, in the aforesaid decision, runs as follows:

Where the question for consideration for the appellate Court is undoubtedly one of fact, the decision of which depends upon the appreciation of

the oral evidence adduced in the case, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having

the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on

facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is -and it is nothing more than a rule of

practice ? that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses,

then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient

balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial

Judge on a question of fact.

The appellate Court is wrong in thinking that it would detract from the value to be attached to a trial Judge's finding of fact if the Judge does not

expressly base his conclusion upon the impressions he gathers from the demeanour of witnesses. The duty of the appellate Court in such cases is to

see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of

improbability arising from proved circumstances which, in the opinion of the Court, outweighs such finding.

65. The Learned Counsel for the Appellants also relies on the decision of this Court in Muthukumara Sthapathiar Vs. Sivanarayana Pillai

(deceased) and Another, , wherein it is held as follows:

Where an alienee from a Hindu coparcener sues the other members of the family for partition, the alienee's right to the property must be worked

out as on the date of his suit for partition and not as on the date of the alienation in his favour.

66. At this stage, this Court aptly points out the decision of this Court in Govindammal V. Murugesan and another, (2011) 5 MLJ 566, wherein it

is held hereunder:

An injunction suit per se cannot be converted into a suit for declaration or in the alternative for partition etc. If law enables the Plaintiff to initiate

any fresh proceedings, it is open for him to do so and it is for the Defendants to resist the same as per law.

67. As far as the present case is concerned, a perusal of the prayer made by the 1st Respondent/Plaintiff (later deceased) shows that the reliefs are

claimed for a declaration of Plaintiff's title to suit item No. 4 and for permanent injunction restraining the Defendants from interfering with the Plaintiff's possession of suit item 4; for partition and separate possession of Plaintiff's 1/4th share in suit item 5; for a declaration of Plaintiff's title to suit item 3 and for recovery of vacant possession of the same and profits from the date of suit; or in the alternative for partition and separate possession of 1/4th share in suit item 1 and for profits from the date of suit. Obviously, the 1st Respondent/Plaintiff (later deceased) has framed the suit making some jumbled prayers/reliefs. Further, the 1st Respondent/Plaintiff (later deceased) has valued the suit for the purpose of Court Fees and Jurisdiction at Rs. 748.13/- and paid a Court Fee of Rs. 58/- in O.S. No. 786 of 1973.

68. In law, an Appellate Court should interfere with the judgment under appeal not because it is not right but when it is shown to be wrong. It is to be noted that the ingredients of Order 41 Rule 33 read with Order 42 Rule 1 of CPC enable the Appellate Court to pass an appropriate Order/Judgment.

69. Under Order 41 Rule 33 of CPC Code, the Appellate Court has power to pass any decree or make any order which ought to have been passed or make fresh decree or order as the case may require. In short, the Appellate Court can grant necessary reliefs according to the circumstances of a given case.

70. A remand will be allowed to enable a party to produce evidence which ought to have been given before a lower Court. Where the Appellate Court cannot decide the Appeal on the basis of an incomplete evidence the case would be remanded. Furthermore, an Appellate Court would remand the case, if it feels that in the interest of justice a fresh trial is required.

71. On going through the available oral documentary evidence on record, this Court opines that if any decision is rendered in Second Appeal, then, it will cause prejudice to the parties touching the merits of the case one way or other. Moreover, this Court also is of the considered view that the existing available oral and documentary evidence on record are not sufficient and in fact, they are incomplete to enable this Court to arrive at a fair, just and equitable decision of the subject matter of the issues involved between the parties to the litigation.

72. In as much as in the main Suit O.S. No. 786 of 1973, the 1st Respondent/Plaintiff (later deceased) has sought an alternative relief of partition

and separate possession of 1/4th share in suit item 1 and for profits from the date of suit etc., this Court, without going into the merits of the case,

remits back the entire subject matter of the issues involved between the parties to the trial Court for fresh disposal in accordance with law and

accordingly, allows the Second Appeal by leaving the Substantial Question open. Also, this Court directs the heirs of the 1st Respondent/Plaintiff

(later deceased) viz., the Respondents 3 to 6 to amend the Plaint by filing necessary Interlocutory Application for impleading all necessary parties

for the purpose of seeking the relief of partition with a view to resolve the disputes in a comprehensive manner. After impleading the necessary

parties, the trial Court is to provide due opportunities to the newly added parties to file their Written Statements and to frame necessary additional

issues to the Suit for consideration based on the subsequent pleadings. Further, the trial Court is directed to go into the issue whether as per

Exs.A.1 and A.2-Sale Deeds, the Plaintiff has got any title to the suit property, when, in fact, his vendors have no title to the property, as

contended by the Appellants/Defendants 1, 3, 4, 6 and 7. The trial Court is also further directed to render its decision/finding as to whether any

reliance can be placed in Exs.A.3 and A.4-Letters, in the absence of registration, at the time of final judgment in the main Suit. Liberty is also

granted to the heirs of the 1st Respondent/Plaintiff (later deceased) to project an application for appointment of an Advocate Commissioner so as

to identify and locate the suit properties, if they are so advised and the trial Court is directed to permit the heirs of the 1st Respondent/Plaintiff in

this regard. It is open to the parties to let in further oral and additional documentary evidence by marking or examining additional witnesses, if they

so desire. The respective parties are granted liberty to raise all factual and legal issues before the trial Court in the Suit. Since the Suit is of the year

1973, the trial Court is directed to dispose of the main Suit within a period of six months from the date of receipt of copy of this judgment and

report compliance to this Court without fail.

73. In the result, the Second Appeal is allowed, leaving the parties to bear their own costs. The judgment and Decree of the trial Court dated

19.12.1980 in O.S. No. 786 of 1973 as well as the First Appellate Court in A.S. No. 108 of 1992 dated 06.02.1995 are set aside, for the reasons assigned by this Court in this Second Appeal.