

(2011) 11 MAD CK 0332

In the Madras High Court

Case No : Second Appeal No. 352 of 1995

Krishnamoorthy and Smt. Thangammal

APPELLANT

Vs

Nagarathinam (deceased) Singaravel and Others

RESPONDENT

Date of Decision : 15-11-2011

Acts Referred:

Tamil Nadu Survey and Boundaries Act, 1923 — Section 10(1), 9

Citation : (2011) 11 MAD CK 0332

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : Aruna for M/s. N. Maninarayan, for the Appellant; P. Srividhya for M/s. S. Viswanathan, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice M. Venugopal

1. The Appellants/Defendants have filed the present Second Appeal as against the Judgment and Decree dated 26/7/1994 in A.S.No. 325 of 1992 passed by the Learned Subordinate Judge, Nagapattinam.

2. The First Appellate Court viz., the Learned Sub-Judge, Nagapattinam, while passing the Judgment in A.S.No. 325 of 1992 dated 26/7/1994 has inter alia observed that the Appellants/Defendants have encroached upon the lane in Survey No. 79/14 as evidenced by the Commissioner's Report and further the aforesaid property belonged to the Respondents/Plaintiffs which is a correct decision and therefore, for removing the encroachment, the Respondents/Plaintiffs are entitled to get the relief of mandatory injunction and accordingly affirmed the Judgment and Decree passed by the Learned District Munsif, Nannilam in O.S.No. 112 of 1989 dated 31/7/1991.

3. Earlier, in the suit filed by the Respondents/Plaintiffs, the trial Court, while passing the Judgment in O.S.No. 112 of 1989 dated 31/7/1991 has opined that in S.No. 79/14, the Respondents/Plaintiffs have a right and further, there is no

need to add other parties and moreover, as to who should be added as a party to the suit proceeding, has not been made mention of and resultantly, granted the relief of declaration and mandatory injunction as prayed for by the Respondents/Plaintiffs.

4. Before the trial Court, on behalf of the Respondents/Plaintiffs, witnesses P.Ws.1 to 5 have been examined and documents Exs.A.1 to A.11 have been marked. On the side of the Appellants/Defendants witnesses D.Ws.1 to 3 have been examined and Exs.B.1 to B.6 have been marked.

5. The trial Court in the main suit, has framed five issues for adjudication. On an appreciation of oral and documentary evidence on record, the trial Court has decreed the suit in favor of the Respondents/Plaintiffs granting the relief of declaration and mandatory injunction and also granted one month time to the Appellants/Defendants to remove the encroachment and handover possession.

6. Being dissatisfied with the Judgment and Decree of the First Appellate Court in A.S.No. 325 of 1992 dated 26/7/1994 passed by the Learned Sub-Judge, Nagapattinam, the Appellants/Defendants have filed the present appeal before this Court, as aggrieved persons.

7. At the time of admission of the Second Appeal, this Court has framed the following substantial questions of law for consideration.

(i). Whether the Courts below are legally right in decreeing the suit as prayed for, even after the Respondents/Plaintiffs had given up part of the claim in respect of the suit property?

(ii). Whether the Courts below are legally right in decreeing the suit as prayed for without taking note of the Plaintiffs deposition which is against their own pleading?

8. THE CONTENTIONS, DISCUSSIONS AND FINDINGS ON POINT Nos. (i) AND (ii):-The Learned counsel appearing for the Appellants/Defendants submits that the trial Court as well as the First Appellate Court have failed to appreciate the fact that the suit has been filed in respect of R.S.No. 79/14 measuring an extent of 0.11 cents and recovery of possession of part of the same property.

9. It is the further contention of the Learned counsel for the Appellants/Defendants that the First Respondent/First Plaintiff as P.W.1, has deposed that the suit has not been filed for 0.11 cents, but only for 0.07 cents and on that ground alone, the suit should have been dismissed.

10. The Learned counsel for the Appellants/Defendants projects a plea that both the Courts below have failed to take note of the fact that the Respondents/Plaintiffs claim at the time of trial has been only 0.07 cents situated in two different survey numbers and one such Survey number is 79/15 is not the subject matter of the suit.

11. Advancing her arguments, the Learned counsel for the Appellants/

Defendants submits that both the Courts have granted the relief of mandatory injunction without reference to the stand of the Respondents/Plaintiffs and in particular without referring to the title.

12. The Learned counsel for the Appellants/Defendants contends that the First Appellate Court viz., the Sub-Judge, Nagapattinam, has failed to appreciate an important fact that the Respondents/Plaintiffs have not proved their title in respect of R.S.No. 79/14 and per contra, the Appellants/Defendants have proved their title to the suit property.

13. In response, the Learned counsel for the Respondents submit that both the Courts have concurrently found that in the place between the Respondents/Plaintiffs house and that of the First Appellant/First Defendant's house, the First Appellant/First Defendant has encroached an extent of 2 feet breadth and 16 feet length and constructed a new wall and as such, the Respondents/Plaintiffs are not able to enjoy the suit place and consequently, held that the Respondents/Plaintiffs have the right in S.No. 79/14 and granted the relief of declaration as well as the relief of mandatory injunction and therefore, the said findings need not be disturbed by this Court in Second Appeal.

14. This Court has heard the Learned counsel appearing for the Appellants/Defendants and the Respondents/Plaintiffs and noticed their contentions.

15. In the plaint, the Respondents/Defendants have averred that they are brothers and Swaminathan is another brother. They have divided their joint family ancestral properties as well as the property acquired by them by means of inheritance from their maternal ancestor Sampornathatchi.

16. Further, the Respondents/Plaintiffs have averred that the suit property measures an extent of 12 links East to West and 100 links North to South adjoining the brick built tiled house. The total extent of the house site is 7 cents, originally belonged to Veerabadhra Asari as per two registered sale deeds dated 23/9/1911 and 4/4/1919. Veerabadhra Asari, in turn, sold an extent of 7 cents to Sampornathatchi, as per registered sale deed dated 16/3/1924. Sampornathatchi is the elder sister of Rasammal, the paternal grand-mother of the Respondents/Plaintiffs. Sampornathatchi has no issues. She has been living with Rasammal's family till her death. Rasammal, pre-deceased Sampornathatchi. Sampornathatchi alone brought up Rasammal's children. In this manner, the Respondents/Plaintiffs and their brother Swaminathan are entitled to the properties of Sampornathatchi. The suit property is the Western most portion of 7 cents as stated earlier, purchased by Sampornathatchi from Veerabadhra Asari.

17. To the West of suit property, a brick built tiled house and backyard of the North is situated. The said house and backyard earlier belonged to Somu Pillai. He died leaving behind him his widow and children. The Second Appellant/Second Defendant is the widow of the said Somu. The Second Appellant/Second Defendant appears to have conveyed the brick built house and its backyard to

the First Appellant/First Defendant as per unregistered sale deed. The First Appellant/First Defendant by means of the said unregistered deed is residing with his family in the house situated immediately to the West of the suit property.

18. The First Appellant/First Defendant made arrangements to project the tiled kottahai portion of his building in front towards further East. Hence, the First Appellant/First Defendant made arrangements to lay a foundation for a wall which is intended to support Kottahai to be extended. About 2 feet East of the house, the First Appellant/First Defendant removed the earth and dug up a pit to lay a foundation of the wall to be constructed. This was on 16/6/1989. The First Respondent/First Plaintiff protested to an attempt of trespass made by the First Appellant/First Defendant. However, the First Appellant/First Defendant represented that the house site purchased by him as per unregistered sale deed from the Second Appellant/Second Defendant is an extent of 5 cents and that the said extent of 5 cents takes within itself the entire suit property. The First Respondent/First Plaintiff sent a telegraphic notice to the First Appellant/First Defendant asking him not to put up any construction encroaching the suit property. Thereafter, a regular notice has been issued by "Registered Post". After receiving the telegraphic notice, the First Appellant/First Defendant completed the offending encroachment by projecting his tiled Kottahai to an extent of 2 feet towards East and a length of 12 feet North - South. The offending construction was completed by the dusk of 17th instant.

19. The First Appellant/First Defendant is giving out that he will extend the wall constructed by him to the East of the Northern wall of his house towards North upto an end. If he has to extend the newly constructed wall upto the end of the North, the First Appellant/First Defendant will be encroaching to an extent of 1,200 links. The suit property belongs to the First Respondent/First Plaintiff as per Registered Partition deed entered into between himself and his brothers viz., the Second Respondent/Second Plaintiff and Swaminathan. Both the Respondents/Plaintiffs are residing in the different portions and as per the partition deed, both of them are using the suit property for reaching the backyard. Thus, both the Respondents/Plaintiffs are interested in keeping the suit property unencroached by the Appellants/Defendants. Hence, the suit is filed for declaration of the First Respondent/First Plaintiff's title to "A" schedule suit property and also for the relief of permanent injunction restraining the Respondents/Defendants from interfering with the possession and user of the suit property by both the Respondents/Plaintiffs as the passage for reaching the backyard and for mandatory injunction, directing the First Appellant/First Defendant to remove the offending construction already made by him and to restore possession of the vacant piece of land encroached by him.

20. At this stage, this Court makes an useful reference to the oral evidence of P.Ws.1 to 5 and D.Ws.1 to 3 for fuller and better appreciation of the case.

21. It is the evidence of P.W.1 (First Plaintiff) that the Second Plaintiff is his brother and his grand mother is Sampoornathatchi and other than the Second

Plaintiff, he has a brother by name Swaminathan and further, he and his brothers have partitioned Sampoorathatchi's properties and the house and backyard, he resides, measures an extent of 7 cents and originally, it belongs to Veerabadhran, which has been purchased by Sampoorathatchi and 7 cents have been purchased by the said Veerabadhran through two sale deeds which are Exs.A.1 and A.2 and Ex.A.3 is the sale deed purchased by his grand-mother Sampoorathatchi and she has taken his father in adoption and Sampoorathatchi's sister is Rajammal and also that Rajammal expired before Sampoorathammal and his father and Sampoorathammal have expired.

22. P.W.1 (in his chief-examination) has further deposed that Sampoorathatchi has purchased the property as per Ex.A.3 sale deed and the First Appellant/First Defendant's house is situated on the upper portion of the said property and the said house belongs to the Second Appellant/Second Defendant's husband and in that house, for 10 to 12 years, the First Appellant/First Defendant has remained as a tenant and in his house, half a share belongs to the First Appellant/First Defendant as informed by the First Appellant/First Defendant on 16/6/1999 and since he informed that he will put up a wall in the upper portion of the lane, he objected for the same and also given a telegram which is Ex.A.4 and Lawyer's notice is Ex.A.5 and the First Appellant/First Defendant has not received the notice and the same has been returned which is Ex.A.6 and the returned telegram not received by the First Appellant/First Defendant is Ex.A.7 and the First Appellant/First Defendant has encroached the lane over night and has constructed the wall.

23. The evidence of P.W.1 is to the effect that a Court Commissioner has inspected the suit property and he submitted Ex.C.1 report and plan is Ex.C.2 and for removing the encroachment, they had filed the suit.

24. P.W.1 (in his cross-examination) has deposed that survey number of the suit property is 79 measuring 14 cents and Exs.A.1 to 3, sale deeds relate to S.No. 79/14, which is a punja land and 79/15 is Natham Jari and Ex.A.3 sale deed refers to S.No. 79/15 in which 7 cents belonged to Natham Jari and as per Ex.A.2 old S.No. 64/A belonged to 4 cents and further Ex.A.1 sale deed refers to old S.No. 64/J, 5 cents punja land and in S.No. 79/14 3 cents and in S.No. 79/15, 4 cents belonged to him.

25. Continuing further, it is the evidence of P.W.1 that, he has not filed the case for 11 cents and he has only filed the case for 7 cents and the said 7 cents are in two survey numbers and for S.No. 79/14, he has not paid the land tax and only pays the house tax and in S.No. 79/14, the total extent is 11 cents and he does not know about the total extent of measurement in S.No. 79/15 and in Ex.A.8, there is no mention of 79/14.

26. The evidence of P.W.1 goes on the effect that he does not know how much extent of land belongs to Somu and Uthandhiya.

27. P.W.2 in his evidence has stated that the plaintiffs' house is in existence for

the past 40 years and the said house is an old one and the Appellants/Defendants house is in existence for twenty years and in between the house of the Respondents/Plaintiffs and that of the Appellants/Defendants, there is a lane which will permit a load cart to pass through and the said lane is in enjoyment of the Respondents/Plaintiffs. Further, in the said lane, if the First Appellant/First Defendant raises a wall, then the load cart cannot pass on and the wall has been constructed by the First Appellant/First Defendant on the same night.

28. P.W.2 (in his cross-examination) has deposed that the First Appellant/First Defendant for the past fifteen years is in enjoyment of his back portion and he does not know whether the wall of the First Appellant/First Defendant is within the "wari" and also, he has not seen the First Appellant/First Defendant putting up the construction in the suit property.

29. P.W.3 in his evidence has deposed that the First Respondent/First Plaintiff has shown him the documents by stating that the First Appellant/First Defendant is claiming half right in the lane and he does not know the surveyor measuring the property and that the wall is situated close to the house of the First Appellant/First Defendant.

30. P.W.4 in his evidence has deposed that for nine years, he has done agricultural work with the First Respondent/First Plaintiff and in the upper side portion of the Plaintiff's house, through the lane, he used to take the fertiliser cart and presently, in that lane, the cart cannot pass on and the reason being in front of the lane, there is a wall.

31. P.W.4 (in his cross-examination) has deposed that from "wari" on the Eastern side, at a distance of 1 feet, the wall is situated and that the fertiliser pit which has been there on the back side of the First Appellant/First Defendant's house, the balance portion of the lane has been enjoyed by the First Appellant/First Defendant's ancestors.

32. P.W.5 in his evidence has deposed that he has brought "C" Register from his office and in the said Register, the old and new survey numbers of Rarandhiri Mangalam Village and as per Register, for old S.No. 64/3, new S.No. is 79/14 and the said entry is seen in the Registers at page 54 which is Ex.A.11.

33. D.W.1 (the First Appellant/First Defendant) in his evidence has deposed that the Second Appellant/Second Defendant is the wife of Somupillai from whom, he purchased the property and that Somupillai is the brother of Uthandiya and the total extent in S.No. 79/14 is 11 cents and Somu Pillai and Uthandiya have 5 cents in 11 cents and Somu" s father Pethaperumal has got the property by means of Ex.B.1 Exchange Deed dated 6/7/1942. Also, in 11 cents, 5 cents on the Southern side has been obtained as per Ex.B.1 in which there have been two Poovarasu trees and one Neem tree and the house in that property has been constructed 20 years before his purchase and during the year 1978, he has purchased 5 cents from the Second Appellant/Second Defendant i.e., Uthandiya and though, there is a document, the same has not been registered and during

November 1978, he has obtained the possession of the same.

34. D.W.1 (in his cross-examination) has deposed that he has got an enjoyment right of 11 cents in S.No. 79/14 and in Ex.B.1, the said cents situated on the back side of 5 cents has been purchased by him through Rowther for which sale deed has not been returned so far and he has purchased the property in S.No. 79/13 from Yusuf Rowther for which no sale deed has been created and on 21/5/1989, he has purchased Ex.B.1 property in wife's name, which is Ex.B.2 and based on Police advise, he has given an petition to the Surveyor for measuring the property and Ex.B.4 is the reply sent by the Tahsildar. Added further, it is the evidence of D.W.1 that thereafter, he has not taken further proceedings and during the year 1984, Surveyor has measured the property and at that time, it has come to know that in S.No. 79/14, the Respondents/Plaintiffs have encroached upon the property and as per measurement, on the back side of the house of the Respondents/Plaintiffs, he has formed a fence and in S.No. 79/14, the Respondents/Plaintiffs have no right.

35. D.W.2 in his evidence has deposed that in order to go to the backyard of the house of the Respondents/Plaintiffs, on the Eastern side of their house, there is a way and before ten years, the mediators have reconciled and it has been measured with the help of a Surveyor and a fence has been formed.

36. D.W.3 in his evidence has deposed that there has been a Panchayat in respect of the suit property and in the Panchayat, there has been a talk that the suit property belong to the First Appellant/First Defendant and with the help of the Surveyor, the same has been measured and the First Appellant/First Defendant has demolished the wall and the same has been renovated by the First Appellant/First Defendant and that he has not constructed a new wall and it is not correct to state that the suit property has been in enjoyment of the Respondents/Plaintiffs for a long time.

37. The Advocate Commissioner, in his report dated 10/4/1990 has stated that the suit property bearing Survey No. 79/14 punja land is also situated next to Natham Jari and the extent of suit property, on measurement comes to 6 1/4 cents and the Plaintiff's house as seen in the plan is in Natham Jari and Punja the suit place is shown in the plan as "ABCD" and in "E" portion, there is a boundary stone, divided the Punja and Natham Jari and to the North of suit property in "AB" place, there is no boundary stone and that the plaintiff's house is situated on the Southern side next to a street and in the plan "BCGH" and place is a lane and as shown in the plan, marked in red, the Defendant has constructed a new wall at a 2 feet breadth and 16 feet length, which is constructed within the "wari" portion of the Defendant and in "EF" place in the plan, there are boundary stones in S.No. 79/14 and in Eastern boundary stones, the house of the Plaintiff in one portion and in between the house of the Defendants, there is a lane.

38. In Ex.A.1 sale deed dated 23/9/1917, executed by Ramachandra

Deekshidhar to and in favor of Veerabadhra Asari, the Punja 0.5 cents in S.No. 64/5 has been sold.

39. In Ex.A.2 sale deed dated 4/4/1919 executed by Vaidhyapillai to and in favor of Veerabadhra Asari speaks off 4 cents Jari in S.No. 64 A.

40. Ex.A.3 is the sale deed dated 16/3/1924 executed by Veerabadhra Asari to and in favor of Sampoomnathatchi refers to S.No. 79-15 Jari 7 cents.

41. Ex.A.4 is the telegram issued by Plaintiff's Advocate addressed to Krishnamurthi (First Appellant/First Defendant) informing that he has attempted to construct wall in the vacant site of his client, is illegal and requested to stop the construction forthwith, etc.

42. In Ex.A.5, the Plaintiff's Lawyer's notice dated 16/6/1989 addressed to the First Appellant/First Defendant, it is mentioned that the Respondents/Plaintiffs have a right in 7 cents viz., in the place of the Eastern side, where the Appellants/Defendants reside.

43. Ex.A.7 is the telegram sent to the First Appellant/First Defendant which has been returned as "not received."

44. In Ex.A.8 partition deed entered into between Nagarathina Asari, Swaminatha Asari and Singaravelu dated 7/10/1972, "A" schedule S.No. 97/5 Nanja measuring 79/15A Jari 0.34 measuring 0.3 1/2 cents and "B" schedule is allotted to Swaminatha Asari in respect of S.No. 106/8 and 9 A Nanja 0.14 cents and S.No. 149/1 Nanja 0.12 cents and S.No. 80/25 Jari land measuring an extent of 0.7 cents. The "C" schedule has been allotted to Singaravelu in respect of S.No. 77/9 Nanja 0.2 cents and (97.5) 0.34 cents and S.No. 79/15 A Jari is 0.3 1/2 cents.

45. Ex.A.9 is the Will dated 10/9/1945 executed by Ammakutty. Ex.A.10 is the Settlement Deed dated 10/10/1936 executed by Sampoomnathammal in favor of Ammakannu in respect of S.No. 79/15 A etc. Ex.A.11 is Raranthimangalam Village properties sub-divisions. As per Ex.A.11, 64 5J is the old survey number and the new survey number is 79/14. For old survey number 64/4A, the new survey number is 79/15.

46. Ex.B.2 is the Sale Deed dated 21/5/1989 executed by Uthandiya Pillai and five others, to and in favor of Kamala Devi, which refers to re-survey No. 79/14 Punja 11 cents inclusive of a mud wall country tiled house.

47. Ex.B.3 is the copy of the complaint given by the First Appellant/First Defendant addressed to the Inspector of Police, Nannilam, mentioning that Nagarathinapathar and six others have removed the fence which has been laid in the presence of an important persons on 22/6/1989 at about 8.10 a.m., and they have encroached upon the said place and as such the inspection of the spot has been prayed for.

48. Ex.B.4 is the letter of the Tahsildar, Nannilam dated 19/3/1990 addressed to

the First Appellant/First Defendant wherein it is among other things mentioned that O.S.No. 112 of 1989 proceedings are conducted before the District Munsif Court, Nannilam and after the completion of the said case, if a new application is filed, then, boundary measurement can be made.

49. In the written statement, the First Defendant, has taken a stand that even as per sale deed dated 14/3/1924, Sampooranathatchi has purchased 0.07 cents in R.S.No. 79/15 which is classified as Natham Jari and as per the records of the Government, R.S.No. 79/15 is Natham Jari. Further more, the Respondents/Plaintiffs relied on a document dated 7/10/1972 which mentions R.S.No. 79/15 which has been subsequently sub-divided as 79/15 A and 79/15 B and "A" schedule and "C" schedule covers the said portion of R.S.No. 79/15 totaling 0.07 cents with specific boundaries mentioned in the partition deed.

50. A further plea of the First Appellant/First Defendant is that Somu Pillai has been the owner of the brick built tiled house bearing 1/86 A in R.S.No. 79/14 and he derived title by exchange and he and his brother Uthandiya Pillai has been in possession of 0.05 cents out of 11 cents in R.S.No. 79/14 and that the Northern portion of the said S.No. 79/14 belongs to one Abdul Yusuff. Also, the Second Appellant/Second Defendant and Uthandiya Pillai have entered into a contract sale with the First Appellant/First Defendant in respect of the house and backyard situated in 0.05 cents as per document dated 10/11/1978. But the said sale deed has not been registered due to the demise of scribe Subramaniya Mudaliar.

51. The First Appellant/First Defendant has entered into the possession of the property and the sale consideration has been fully passed on Uthandiya Pillai and the Second Appellant/Second Defendant. That apart, the North of the said property has been in possession of the First Appellant/First Defendant as per oral agreement of purchase with Abdul Yusuf, who is the title owner of the property, ever since from the date of purchase of the Southern portion. Therefore, the entire 0.11 cents in R.S.No. 79/14 has been in possession of the First Appellant/First Defendant. East of the house of the First Appellant/First Defendant, there is a vacant space which is also in R.S.No. 79/14 and belonging to the First Appellant/First Defendant, who is in possession of the same. The house portion of 0.05 cents in R.S.No. 79/14 has been sold by the Second Appellant/Second Defendant and Uthandiya Pillai and his sons on 21/5/1989 in favor of the First Appellant/First Defendant's wife.

52. It is to be noted that the Respondents/Plaintiffs claim at the time of trial of the suit has been only with reference to 0.07 cents situated in two different survey numbers and S.No. 79/15 is not the subject matter of the suit. The disputed wall is both in S.Nos.79/14 and 79/15. Ex.A.1 Exchange Deed dated 23/9/1917 relates to S.No. 64/5 measuring Punja 5 cents. Ex.A.2 sale deed dated 4/4/1919 refers to S.No. 64/A Jari 4 cents. But what the Respondents/Plaintiffs claim is 7 cents which is in two different survey numbers.

53. At this stage, this Court worth recalls the evidence of P.W.1 (in his cross-examination) that in S.No. 79/14, 3 cents and in S.No. 79/15, 4 cents belonged to him and he has not filed a case for 11 cents, but only filed a case for 7 cents, which is in two different survey numbers and further, he does not know the total extent of S.No. 79/15.

54. A perusal of the plaint "A" schedule description of property shows that the suit has been filed by the Respondents/Plaintiffs praying for declaration of title of the First Respondent/First Plaintiff in regard to "A" schedule property viz., R.S.No. 79/14 measuring the total extent of 11 cents. Contrary to the pleading in the plaint, P.W.1 (First Respondent/First Plaintiff, in his evidence) has deposed that he has not filed the case for 11 cents but only filed for 7 cents which is in two different survey numbers. As a matter of fact, Ex.A.3 sale deed dated 16/3/1924 is in respect of S.No. 79/15 for 7 cents Natham Jari.

55. It is to be noted that when the Respondents/Plaintiffs have filed a suit for declaring the First Respondent/First Plaintiff's title in respect of "A" schedule property in R.S.No. 79/14 for 11 cents and in evidence, P.W.1 has deposed that he has got a right in S.No. 79/4 -3 cents and in S.No. 79/15 - 4 cents. Further, he has filed a case only for 7 cents and that 7 cents is in two different survey numbers. Both the Courts have held that the description given in the plaint by the Respondents/Plaintiffs are correct, which finding, this Court is not in agreement of the same. It is the duty of the Respondents/Plaintiffs to prove the title in respect of R.S.No. 79/14. In a civil case, the Plaintiffs have to succeed on their own strength. They have to prove their case by means of preponderance of probabilities to the subjective satisfaction of the Court.

56. The trial Court in para 5 of the Judgment in the main suit has stated that D.W.1 has deposed that the suit property has been measured by Surveyor and paid the measurement fee for which there is a receipt and the report of the Surveyor is with the Revenue Department. But those documents have not been filed before the trial Court. As also, the trial Court has further observed that it is not known from Ex.B4 challan that the Surveyor has measured the suit property. As a matter of fact, the trial Court has accepted the plea of the Respondents/Plaintiffs that the four boundaries will prevail over an extent.

57. An Advocate Commissioner has been appointed before the trial Court in I.A.No. 1099 of 1989 in O.S.No. 112 of 1989 for the purpose of inspecting the suit property and to note down the physical features after localizing R.S.No. 79/14 with the help of Surveyor concerned after giving notice to both the parties. The trial Court has not directed the Advocate Commissioner to inspect the suit property and to note down the physical features after localizing R.S.No. 79/14 with the help of sale deeds or parent documents. Generally, a deficiency/defect in a Commission report can be cured by calling for a supplementary report from the Commissioner, if the Commissioner prepares a report and a map on the basis of fixed points, title deeds, revenue documents, then the same can be accepted by the Court of Law, after providing necessary opportunity to the defendants to

raise their objection, etc., with the help of field measurement book and Taluk Surveyor, the suit property can be identified. In the instant case on hand, the Tahsildar, Nannilam through his communication dated 19/3/1990 addressed to the First Appellant/First Defendant stated that after completion of O.S.No. 112/1989 before the trial Court, if a new application/petition is filed, then the property can be measured and shown. Therefore, it is quite evident that the Tahsildar, Nannilam has informed the First Appellant/First Defendant as per his letter dated 19/3/1990 that after completion of the case in O.S.No. 112/1989, if an application is filed for measuring the property, the same can be measured and shown in respect of S.No. 79/4.

58. There is a dispute in regard to the boundary and the Tamil Nadu Survey and Boundaries Act, 1923, in Section 10 (1) of the Act, confers the powers of the Survey Officer to determine and record disputed boundary and when a boundary is disputed, the Survey Officer after making such an enquiry, as he considers necessary, shall determine the boundary and record it in accordance with his decision and the said decision shall be recorded in writing for the reasons mentioned by him. As per Section 10 (2) of the Act, Notice to the parties to the dispute and to registered holders of lands affected will be given and the Tamil Nadu Survey and Boundaries Act, 1923 provides for filing of an appeal as per Section 9 and 10 of the Act. If the Second Appeal can be preferred before the appropriate authority under the Act.

59. Before the First Appellate Court, viz., the Sub-Court, Nagapattinam, in A.S.No. 325 of 1992, the Appellants/Defendants have filed I.A.No. 54 of 1994 praying permission to receive the additional documents and the original sale deed dated 23/9/1917 of Ex.A.1 Registration Copy of the sale deed dated 23/9/1917 has been marked as Ex.B.7 and the Sale Deed dated 17/4/1952 in favor of Abu Bakkar Rowther executed by Veerabadhiran Achari and Narayana Achari has been marked as Ex.B.8 and finally, I.A.No. 54 of 1994 has been allowed.

60. On going through the Judgment of the trial Court in O.S.No. 112 of 1989 dated 31/12/1991 and the Judgment and Decree of the First Appellate Court in A.S.352 of 1992, this Court comes to an inevitable conclusion that both the Courts have come to an incorrect conclusion that the description given in the plaint is a correct one. The real fact is that at the time of trial of the suit, the Respondents/Plaintiffs claim has been only with reference to 0.07 cents situated in two different survey numbers, as admitted by P.W.1 (First Plaintiff in his cross-examination) and further, he has not filed the suit for 11 cents (though the suit is only for 11 cents in respect of R.S.No. 79/14 relating to "A" schedule property). In reality, the evidence of P.W.1 (First Plaintiff) at the risk of repetition, is only that, he claims an extent of 3 cents in R.S.No. 79/14 and 4 cents in R.S.No. 79/15 and in all for 7 cents in two different survey numbers. Obviously, the Respondents/Plaintiffs have given a go by to the claim 11 cents in R.S.No. 79/14 in respect of "A" schedule, wherein, they have prayed for the relief of declaration

and injunction, but in the evidence, P.W.1 (First Respondent/Plaintiff) has stated that, he claims total extent of 7 cents in S.No. 79/14 (3 cents) and 79/1 (4 cents).

61. It is to be borne in mind that S.No. 79/15 is not the subject matter of the suit. Since both the Courts have not dealt with the material subject matter of the issues involved between the parties in a proper respective, this Court without going into the merits of the matter is of the considered opinion that it is imperative that the subject matter of the suit requires reconsideration/to be decided afresh. Further, the available oral and documentary evidence on record are not sufficient to enable this Court to come to a proper and fair conclusion in regard to the disputes/controversies involved between the parties. Therefore, this Court exercising its inherent power to prevent the ends of justice being defeated, remits back the entire gamete of the matter for fresh disposal to the trial Court and as such leaves open the substantial questions of law (i) and (ii) unanswered to promote substantial cause of justice.

62. In the result, the Second Appeal is allowed, leaving the parties to bear their own costs. Consequently, the Judgment and Decree of the trial Court in O.S.No. 112 of 1989 dated 31/7/1991 and the Judgment and Decree of the First Appellate Court dated 26/7/1994 in A.S.No. 325 of 1992 are set aside by this Court to promote the substantial cause of Justice. O.S.No. 112 of 1989 is remanded back to the trial Court for fresh disposal in accordance with law. It is open to the parties to let in additional oral and documentary evidence and the trial Court shall permit them in this regard. Liberty is given to the parties to appoint a Surveyor by filing necessary application before the trial Court. The trial Court shall fix the remuneration to the Surveyor and direct the concerned parties to pay the same. Before the Revenue Surveyor, it is open to the parties to produce their sale deeds or antecedent sale deeds/parent documents to prove their respective contentions. The Revenue Surveyor is directed to furnish his report to the trial Court after examining the parties, if situation so warrants. After the submission of the report by the Survey Commissioner, it is open to the parties to file necessary objections to his report and also if need be, the Survey Commissioner be examined before the Court as a Court witness (in addition to Exs.C.1 and C.2 report and plan, which has been marked in the suit), in any event, the trial Court is directed to dispose of O.S.No. 112 of 1989, by conducting the trial of the case (preferably on day-to-day basis and avoiding unnecessary arrangements) within a period of six months from the date of receipt of a copy of this Judgment.