

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.05.2012

CORAM

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

S.A.No.131 of 1993 and
S.A.No.1181 of 1995 and
Cross Objection No.48 of 1997

S.A.No.131 of 1993:

1.Lalithammal (deceased)

.... Appellant/Appellant/Defendant

2.M.Nagarani

3.M.Chitra

4.M.Geetha

5.M.Sundaravaradhan

... Appellants

(Appellants 2 to 5 are brought on record
as LR of the deceased sole Appellant vide
order dated 11.09.2004 in CMP.No.21293/2003)

Vs.

1.Rajalakshmi

2.Udayasankar

... Respondents/Respondents/Plaintiffs

Prayer: Appeal filed under Section 100 of Code of Civil Procedure, against the Judgment and Decree dated 25.03.1991 in A.S.No.12 of 1989 on the file of the Learned Sub Court, Cuddalore, (A.S.No.95 of 1989 South Arcot District (Vacation) Court, Cuddalore) modifying the Judgment and Decree made in O.S.No.692 of 1986 dated 28.03.1989 on the file of the District Munsif's Court at Cuddalore.

For Appellants 2 to 5 : Mrs.Chitra Sampath

For 1st Appellant : Died

For Respondents : Mr.R.Yashod Vardhan
Senior Counsel
For M/s.Sunilkumar

S.A.No.1181 of 1995:

1.Lalithammal (deceased)

... Appellant/Appellant/Plaintiff

2.M.Nagarani

3.M.Chitra

4.M.Geetha

5.M.Sundaravaradhan

... Appellants

(Appellants 2 to 5 are brought on record
as LR of the deceased sole Appellant vide
order dated 11.09.2004 in CMP.No.21295/2003)

Vs.

Udayasankar

... Respondent/Respondent/Defendant

Prayer: Appeal filed under Section 100 of Code of Civil Procedure,
against the Judgment and Decree dated 25.03.1991 in A.S.No.14 of 1989
on the file of the Learned Sub Court, Cuddalore, (A.S.No.79 of 1989
South Arcot District (Vacation) Court, Cuddalore) modifying the
Judgment and Decree made in O.S.No.447 of 1988 dated 28.03.1989 on
the file of the District Munsif's Court at Cuddalore.

For Appellants 2 to 5 : Mrs.Chitra Sampath

For 1st Appellant : Died

For Respondents : Mr.R.Yashod Vardhan
Senior Counsel
For M/s.Sunilkumar

Cross Objection No.48 of 1997 in S.A.No.131 of 1993:

1.Udayasankar

2.Rajalakshmi

... Cross Appellants/Respondents

V.

1.Lalithammal (deceased)

2.M.Nagarani

3.M.Chitra

4.M.Geetha

5.M.Sundaravaradhan

Respondents/Appellants

(Respondents 2 to 5 are brought on record
as LR of the deceased sole Respondent vide
order dated 20.12.2005 in CMP.No.16109 of 16111/2004)

Prayer : Cross Appeal filed under Order 41 Rule 22 of Civil Procedure Code in so far as the Decree passed in A.S.No.12 of 1989 dated 25.03.1991 on the file of the Sub Court, Cuddalore.

For Appellants : Mr.R.Yashod Vardhan
Senior Counsel
For M/s.Sunilkumar

For 1st Respondent : Died

For Respondents 2 to 5 : Mrs.Chitra Sampath

COMMON JUDGMENT

S.A.No.131 of 1993:

The Appellant/Defendant (later deceased) has preferred the present Second Appeal as against the Judgment and Decree dated 25.03.1991 in A.S.No.12 of 1989 passed by the Learned Sub Judge, Cuddalore in modifying the Judgment and Decree dated 28.03.1989 in O.S.No.692 of 1986 passed by the Learned District Munsif, Cuddalore.

During the pendency of the Second Appeal No.131 of 1993, the Appellant/Defendant has expired and hence, the Appellants 2 to 5 have been brought on record as Legal Representatives of the deceased sole Appellant as per order dated 11.09.2004 in C.M.P.No.21293 of 2003.

Cross Appeal No.48 of 1997:

The Respondents/Plaintiffs (in S.A.No.131 of 1993) have preferred the instant Cross Appeal as against the Judgment and Decree dated 25.03.1991 in A.S.No.12 of 1989 passed by the Learned Sub Judge, Cuddalore, in so far as they are adverse to them.

S.A.No.1181 of 1995:

The Appellant/Plaintiff has filed the present Second Appeal as against the Judgment and Decree dated 25.03.1991 in A.S.No.14 of 1989 passed by the Learned Sub Judge, Cuddalore in declaring her half share in respect of the suit property etc.

2.The Plaint Facts in O.S.No.692 of 1986 filed by the Respondents/Plaintiffs:

(i)The suit property is a portion of property in T.S.No.866 within the municipal limits of Cuddalore. The said property has been purchased by one Kamalammal by means of a registered sale deed dated 17.06.1960. The sale deed makes reference to T.S.No.865 wrongly. As

per boundaries mentioned in the document it ought to relate to S.No.866 only. Kamalammal is the wife of 1st Respondent/ 1st Plaintiff's husband's brother Perumal Padayachi. When the family of the 1st Respondent/1st Plaintiff's husband and his brothers remained joint, they purchased several items of properties south and west of the suit property through various sale deeds, joint exertions, though certain sale deeds have been taken in the name of respective wives. The purchase dated 17.06.1960 mentioned above is one such transaction. The benefit under the transaction enuring to the family. All the items of properties purchased have been orally divided some time in the year 1962 among the brothers with the consent of their female members in whose names the various items of properties stood purchased. In the partition, the suit property has been allotted to the 1st Respondent/1st Plaintiff and the property of equal extent on the west has been allotted to Kamalammal. The parties have been using the respective items as Kalam for the remaining items of properties, situate on their south and west. There was also a fence on the south demarcate the actual area in the kalam allotted to the 1st Respondent/ 1st Plaintiff.

(ii) There is a lack of amity between the 1st Respondent/ 1st Plaintiff's husband and his brother Perumal. Perumal and his wife Kamalammal sold away all their property situate in T.S.No.865, 866, 863 and 1074 to the Defendant to the Defendant contained several deliberate mistakes to spite the 1st Respondent/ 1st Plaintiff and her husband with reference to the extent of property conveyed, the existence of waterways etc. The Appellant/Defendant filed O.S.No.535/77 on the file of Learned District Munsif, Cuddalore against the 1st Respondent/1st Plaintiff and her husband to establish the purported Easementary Right to take water through the 1st Respondent/1st Plaintiff's lands, basing her claim on the false recitals in the sale deed. The said suit has been dismissed after contest. The Appellant/Defendant filed A.S.No.20/80 before the Sub Court, Cuddalore and the Appeal has been dismissed. The Appellant/Defendant has allowed her property in T.S.No.866 to remain fallow and recently she has converted them into housing plots. The 1st Respondent/1st Plaintiff likewise wanted to dispose of her properties adjacent to the Anaikuppam road and has prepared a layout to sell them as house sites.

(iii) The 1st Respondent/1st Plaintiff sold the property to the 2nd Respondent/2nd Plaintiff through a sale deed dated 14.04.1986 for a valuable consideration of Rs.9,000/-. However, there is a mistake in regard to the western and eastern boundary of the property described in the schedule of the sale deed. The 1st Respondent/1st Plaintiff by oversight has referred to the western moiety as belonging to her. The Appellant/Defendant has filed O.S.No.401/86 on the file of District

Munsif, Cuddalore for declaration of title to her western moiety in T.S.No.866. The 1st Respondent/1st Plaintiff has come to know of the mistake in her sale deed after receipt of summons in the suit on 30.04.1986. The parties to the document have intended to effect conveyance in respect of eastern moiety and the sale itself operated to create title in respect of the eastern moiety only. In any event, to avoid future confusion in regard to the identification of the property, the 1st Respondent/1st Plaintiff has effected rectification of the mistake with reference to the eastern and western boundaries by executing rectification deeds on 30.05.1986 and 12.06.1986. The 2nd Respondent/ 2nd Plaintiff never attempted to put up any construction in the western moiety and the suit has been filed on an imaginary cause of action.

(iv) The 2nd Respondent/2nd Plaintiff actually has taken possession of the eastern moiety only viz., the suit property and pursuant to the purchase when he has been making preparations for putting up a superstructure, the Appellant/Defendant has been causing obstruction to his peaceful enjoyment. The Appellant and her predecessors in interest have never asserted title nor enjoyed the suit property. In the rough plan filed by the Appellant/Defendant together with the plaint in O.S.No.535/77, she has referred to the suit property as the property belonging to the 1st Respondent/1st Plaintiff. Even the Commissioner's report in O.S.No.535/77 demarcates the suit property distinctly as different from the other areas in the enjoyment of the Appellant/ Defendant. The Appellant/Defendant by her own conduct has admitted the title of the 1st Respondent/1st Plaintiff to the suit property in prior proceedings and she is estopped from denying the same. The 1st Respondent/1st Plaintiff and the 2nd Respondent/2nd Plaintiff as a subsequent purchaser have, in any event, prescribed title to the suit property by means of adverse possession. Hence, the present suit is filed for the relief of declaration of the 2nd Respondent/2nd Plaintiff's title to the suit property and for a consequential permanent injunction.

3.The Written Statement Pleas of the Appellant/Defendant:

(i) It is true that the suit property is a portion of T.S.No.866, that it has been purchased by one Kamalam as per Sale Deed dated 17.06.1960 and that in the said sale deed, the T.S. Number has been wrongly given as T.S.No.865 however, the boundaries relate only to 866. The other allegations in the plaint are all false. It is false to state that during the year 1962 in an oral partition, the suit property has been allotted to the 1st Respondent/1st Plaintiff and an equal extent on the west has been allotted to Kamalam ammal, that the parties have been using the respective items as "Kalam" for the remaining items of properties.

(ii) Kamalam Ammal and her husband Perumal have executed sale deed in favour of the Appellant/Defendant on 22.02.1967. It is false to state that the said sale deed contains lot of mistakes. The entire property situate south of Anaikuppam Road, east of land of Hanumantha Rao now owned by one Selvaraj, north of the 1st Respondent/1st Plaintiff in T.S.No.865 and west of Kalyani Ammal land now owned by L.Venkatakumar measuring east-west 82' on the north 100' on south, north-south 119' on the west and 122' on the east, which is inclusive of suit property herein has been allotted to and has been in possession and enjoyment of Kamalam Ammal. She sold the same to the Appellant/Defendant as per registered sale deed dated 22.02.1967. Ever since then, the Appellant/Defendant alone has been and is in possession and enjoyment of the same. In the said sale deed, the mistake in regard to T.S. number continued. But the boundaries given only in respect of the aforesaid entire property and the Appellant/Defendant alone continued to be in possession and enjoyment of the entire extent mentioned supra. This fact is also evidenced from subsequent proceedings. In any event, the Appellant/Defendant and her predecessors in title have also prescribed title through adverse possession by being in open, continuous possession of the said property adverse to the interest of any one else for well over the statutory period, for the last several decades.

(iii) The suit O.S.No.535/77 is in regard to the channel dispute which is not subject matter in the present suit. In the said suit, the Advocate Commissioner and the Inspector of Survey and Land Records, Cuddalore who have been appointed as Commissioners visited the properties and submitted their reports and plans, wherein they have clearly shown that the entire property is being in the possession of the Appellant/Defendant. The 1st Respondent/1st Plaintiff has not raised her little finger in respect of the same.

(iv) The 1st Respondent/1st Plaintiff's husband is inimical as against the Appellant/Defendant and her husband. The vendors of the Appellant/Defendant Kamalam Ammal and her husband Perumal are now colluded with the 1st Respondent/1st Plaintiff. While so, at the instigation of her husband the 1st Respondent/1st Plaintiff has executed a sale deed in favour of the 2nd Respondent/2nd Plaintiff on 16.04.1986 in respect of portion on the western side of the entire property. Based on that sale deed, the 2nd Respondent/2nd Plaintiff attempted to commit trespass on the said portion. Therefore, the Appellant/ Defendant filed a suit O.S.No.401/86 against the Respondents/ Plaintiffs and obtained an order of injunction against the 2nd Respondent/2nd Plaintiff. The said suit has been filed and injunction has been granted on 28.04.1986 and the said order of injunction is in force till date. The Respondents/Plaintiffs have executed two documents dated 13.05.1986 and 12.06.1986 in order to defeat the suit filed in O.S.No.401/86. The sale deed dated

16.04.1986 and the rectification deeds dated 13.05.1986 and 12.06.1986 alleged to have been executed by the 1st Respondent/1st Plaintiff in favour of the 2nd Respondent/2nd Plaintiff are not true, valid and supported by consideration. The Respondents/Plaintiffs have neither title nor possession.

(v) It is false to state that the 2nd Respondent/ 2nd Plaintiff has taken possession of the eastern moiety in the said property and that the Appellant/Defendant is causing obstruction. It is also false to state that the Appellant/Defendant has admitted the title of the 1st Respondent/ 1st Plaintiff to the suit property in prior proceedings and the Appellant/ Defendant is effected from denying the same. The 1st Respondent/1st Plaintiff has admitted and acquired the title of the Appellant/Defendant to the entire extent of the property mentioned, inclusive of the suit property. Therefore, the 1st Respondent/1st Plaintiff is estopped from denying the title and possession of the Appellant/ Defendant over the suit property. The 2nd Respondent/2nd Plaintiff who claims title under the 1st Respondent/1st Plaintiff is also estopped from questioning the Appellant/Defendant's title or possession over the suit property.

(vi) Since the Respondents/Plaintiffs have got neither title nor possession, they are not entitled to any of the reliefs prayed for. The Appellant/Defendant is entitled to and is in possession and enjoyment of the entire extent mentioned supra inclusive of the suit property. The Respondents/Plaintiffs have created false documents to harass the Appellant/Defendant and hence, they are liable to pay compensatory costs.

4. The Plaint Facts in O.S.No.447 of 1988 filed by the Appellant/Plaintiff:

(i) The suit property described in the plaint is a portion of T.S.No.866 situated at Anaikuppam, Manjakuppam Cuddalore. The entire property has been originally purchased by one Kamalam Ammal as per sale deed dated 17.06.1960. In the said sale deed item No.1 is the suit property, which is situated south of Anaikuppam Road, East of Hanumantha Rao property (now owned by Selvaraj S/o.Kandasamy Padayachi) West of Kalyani Ammal's land (now owned by L.Venkatakumar) and north of Rajalakshmi land. Even though the survey number given in the document is 865, it is only a mistake and the correct survey number is 866. Survey No.865 is not situate south of Anaikuppam road and the property situate within the stated boundary is only portion of T.S.No.866.

(ii) Kamalam's husband is one Perumal. Perumal's brother is Srinivasan and Srinivasan's wife is one Rajalakshmi .

(iii) Subsequently, the property purchased by Rajalakshmi and the properties purchased by Kamalam have been orally divided between

themselves in or about 1960 in which the entire suit property has been allotted to the share of Kamalam. She is in possession and enjoyment of the same and then sold it to the Appellant/Plaintiff as per registered sale deed executed by herself and her husband Perumal on 22.02.1967 and ever since then the Appellant/Plaintiff is in possession and enjoyment of the same. In the said sale deed also, the same mistake in regard to survey number has crept in. But the boundaries alone will prevail and it is a matter of fact that the Appellant/Plaintiff alone is entitled to and has been in possession and enjoyment of the suit survey number. The property situate within the stated boundary and marked as ABCFDE in the plaint plan. This fact is also evident from the subsequent proceedings. In any event, the Appellant/Plaintiff has prescribed title by adverse possession to the suit property.

(iv) There is a dispute between the Appellant/Plaintiff on the one hand and the said Rajalakshmi and her husband in regard to a channel, which is not the subject matter of the present suit, which led to a filing of a suit in O.S.No.535/77 on the file of this Court. In the said suit, an Advocate Commissioner has been appointed who visited and measured the property with the help of the Inspector of Survey and Land Records, Cuddalore and they submitted the reports together with plans. In the said reports and plans, it is specifically stated that the suit property is Appellant/Plaintiff's property and it is in her possession and enjoyment for which no objection has been filed by the Defendant in the said suit in respect of the suit property. The patta for the suit property is No.24.

(v) The said Rajalakshmi at the instance of her husband, is enemical towards the Appellant/Plaintiff and her husband has executed a sale deed in favour of the Defendant on 16.04.1986 claiming false title over a portion on the western side of S.No.866 and in pursuance of the said bogus sale deed, the Defendant herein attempted to trespass into that property. Hence, the Appellant/Plaintiff filed suit in O.S.No.401/86 for declaration of her title to that property and for injunction and obtained an exparte order of ad-interim injunction. Later, the said injunction has been made absolute on 17.03.1988.

(vi) After filing of that suit with a malafide intention the Defendant obtained two rectification deeds in his favour on 30.05.86 and 02.06.86 as though the sale deed covers the portion on the eastern side of the suit survey number i.e. the suit property in this suit and has filed a suit in O.S.No.692/86 on the file of this Court for declaration of his title to the suit property and for permanent injunction.

(vii) The said Rajalakshmi has no right or title over the suit property. The Defendant has no right over the property and the sale

deed as well as the Rectification Deed are not true and valid. They will not convey right or title over the suit property to the Defendant. Even after the said Rectification Deed, the Appellant/Plaintiff alone continued to be in possession and enjoyment of the suit property.

(viii) A month ago, the Appellant/Plaintiff has fallen sick. Hence, she has gone to Madras for treatment with her husband and family. Only when her husband has returned to Cuddalore last week through him she has come to know that taking advantage of the absence of her and her husband, the Defendant has illegally and highhandedly committed trespass into the suit property. The Appellant/Plaintiff has filed the present suit for declaration of a title to the suit property and for recovery of possession after removing the foundation laid by the Defendant. Therefore, the Appellant/Plaintiff has filed a suit seeking the relief of declaration of her title to the suit property and for issuance of direction by this Court to the Defendant to deliver vacant possession of the suit property to her, after removing the construction put up thereon.

5. The Written Statement Pleas of the Respondent/Defendant:

(i) The suit property and other properties have been purchased in the name of Kamalam and there has been a partition in Perumal and Srinivasan's family in or about year 1960. Kamalam is Perumal's wife. The suit property has been allotted to the Srinivasan and not to either Kamalam or her husband Perumal. The allegation in paragraph 5 of the plaint that the suit property has been allotted to Kamalam and that she is in possession of the suit property since then is false. It is equally false to state that the suit property has been sold to Lalitha on 22.02.1967. The truth and validity of the sale deed is denied.

(ii) It is true that the Appellant/Plaintiff has filed a suit in O.S.No.535/77 against Srinivasan and Rajalakshmi, the Respondent/Defendant's vendor. Though the suit has been decreed, in the appeal filed by the Respondent/Defendant's vendor in A.S.No.20 of 1979 the appeal has been allowed dismissing the Plaintiff's suit. It was specifically mentioned in the Judgment that the sale deed in favour of the Appellant/Plaintiff contained several false recitals and made reference to several rights which are not in existence. If indeed, the sale deed in favour of the Appellant/Plaintiff contains any reference to the suit property, it ought to be false. The sale deed conveyed no title to the Appellant/Plaintiff in respect of the suit property and that she has never been in the enjoyment of the same.

(iii) It is false to state that the Appellant/Plaintiff referred to the suit property as being in her enjoyment and the Commissioner

also found the suit property in her enjoyment. The suit property has been shown specifically to be in possession of the Respondent/Defendant's vendor in the rough sketch filed by the Appellant/Plaintiff. A perusal of the Certified copy of Plaint plan in O.S.No.401 of 1986 will show that the Appellant/Plaintiff has only shown the red mark area to be in her enjoyment. The suit property is not shown in red.

(iv) The Respondent/Defendant purchased the suit property as per sale deed dated 16.04.1986. The sale deed contained an error in the description and that the Appellant/Plaintiff has taken advantage of it and filed a suit in regard to the western moiety in O.S.No.401/1986. The Respondent/Defendant noticed the mistake only after he has been served with summons from the Court and he obtained rectification deeds from his vendor, whereby the suit property has been affirmed to have been conveyed in his favour. The Respondent/Defendant and his vendors always intended only the eastern moiety to be covered under the sale deed dated 16.04.1986. The Respondent/Defendant soon after the purchase has started the constructions. The Appellant/Plaintiff has known about the Respondent/Defendant's preparations for construction and she never raised any objection when the building has been built. The Respondent/Defendant has spent so far Rs.18,000/- for the construction which has actually been put up before the institution of the Appellant/Plaintiff's suit. The Appellant/Plaintiff has not objected to the Respondent/Defendant's construction in the suit property, he is equitably estopped from causing any obstruction. The Respondent/Defendant has constructed the building so far under good faith in exercise of assertion of ownership over the suit property. The Respondent/Defendant will be greatly prejudiced if his possession is disturbed. He is entitled to be compensated suitably even in the event of the Appellant/Plaintiff obtaining a decree, as per Section 51 of the Transfer of Property Act.

(v) The Appellant/Plaintiff is not at all entitled to the suit property and her attempt is to stall the construction and cause embarrassment. The allegation that the Appellant/Plaintiff has fallen sick and has gone to Madras for treatment are false. The Respondent/Defendant's possession of the suit property from the date of purchase is open and he and his predecessors in title have been in continuous possession for more than the statutory period and they are prescribed title to the same by means of adverse possession. The construction work of the Respondent/Defendant has started soon after his purchase in exercise of his ownership over the property. It cannot be termed to be an illegal trespass.

6. Before the trial Court, three suits viz., O.S.No.401/1986, O.S.No.692/1986 and O.S.No.447 of 1988 have been tried based on memo filed praying for passing of a common judgment, on the basis of letting in evidence in O.S.No.401 of 1986 (to be taken for other suits) and as such, the trial Court has delivered a common Judgment.

7. Before the trial Court, witnesses P.W.1 to P.W.3 have been examined and Exs.A.1 to A.15 have been marked. On the side of Defendants witnesses D.W.1 and D.W.2 have been examined and Exs.B.1 to B.8 have been marked and Exs.C.1 and C.2 have been marked.

8. The trial Court, on an appreciation of oral and documentary evidence available on record, has decreed O.S.No.401/1986 in favour of the Plaintiff therein as prayed for in the Plaint without costs. It also decreed O.S.No.692/1986 without costs as prayed for by the Plaintiffs therein. However, it has dismissed O.S.No.447/1988 without costs filed by the Appellant/Plaintiff.

9. Earlier, the Appellant/Defendant has preferred A.S.No.12 of 1989 as against the Judgment and Decree dated 28.03.1989 in O.S.No.692 of 1986 passed by the Learned District Munsif, Cuddalore.

10. The First Appellate Court, in A.S.No.12 of 1989, after contest, on 25.03.1991, has passed a Judgment declaring that the 2nd Respondent/ 2nd Plaintiff is entitled to get the relief of half share in respect of the suit property and in respect of that half share granted the relief of permanent injunction in favour of the 2nd Respondent/ 2nd Plaintiff and against the Appellant/Defendant and accordingly, passed a decree to that effect and allowed the Appeal in part without costs.

11. Being aggrieved against the Judgment and Decree of the First Appellate Court in A.S.No.12 of 1989, the Appellant/Defendant has preferred the present Second Appeal No.131 of 1993 before this Court, as an aggrieved person.

12. The Respondents 1 and 2/Plaintiffs have filed Cross Appeal No.48 of 1997 in S.A.No.131 of 1993 being dissatisfied against the Judgment and Decree dated 25.03.1991 in A.S.No.12 of 1989 passed by the Additional Subordinate Judge, Cuddalore [in regard to the adverse findings rendered].

13. The Appellant/Plaintiff, being aggrieved against the Judgment and Decree dated 25.03.1991 in A.S.No.14 of 1989 passed by the Learned Additional Subordinate Judge, Cuddalore in modifying the Judgment and Decree dated 28.03.1989 in O.S.No.447 of 1988, has

preferred S.A.No.1181 of 1995 before this Court.

14.At the time of admission of the Second Appeal No.131 of 1993, the following Substantial Questions of Law are framed by this Court for determination:

"1.Whether the appellate Court is correct in holding that the appellant and the second respondent are entitled to have half share in the suit property since it is a common property, and whereas the same was not pleaded by either of the parties?

2.Whether the Courts below have committed material irregularity in ignoring descriptions and boundaries contained in the sale deed under Ex.B.6 which were not disputed by the respondents, and the same will prevail over the extent claimed by the respondents?"

15.At the time of admission of the Second Appeal No.1181 of 1995, the following Substantial Questions of Law are framed by this Court for determination:

"1.Whether the appellate Court is correct in holding that the appellant and the respondent are entitled to have half share in the suit property since it is a common property, and whereas the same was not pleaded by either of the parties?

2.Whether the Courts below have committed material irregularity in ignoring the descriptions and boundaries contained in the sale deed under Ex.B.6 which were not disputed by the respondent, and the same will prevail over the extent claimed by the respondent?"

The Contentions, Discussions and Findings on Substantial Questions of Law 1 and 2 in both S.A.No.131 of 1993, S.A.No.1181 of 1995 and in Cross Objection No.48 of 1997:

16.The Learned Counsel for the Appellant submits that the trial Court as well as the First Appellate Court have not disputed the boundaries in regard to the property sold to the deceased Appellant (Lalithammal) as per Ex.B.6-Sale Deed dated 22.02.1967.

17.According to the Learned Counsel for the Appellant, when the recitals of Ex.B.6-Sale Deed dated 22.02.1967 are clear and unambiguous in regard to the extent and boundary conveyed to the Appellant (deceased Lalithammal), the Courts below have erred in relying upon the oral evidence of the Respondents.

18. Advancing her arguments, it is the contention of the Learned Counsel for the Appellant that the First Appellate Court has committed an error in coming to the conclusion that the 2nd Respondent/2nd Plaintiff in O.S.No.692 of 1986 (Udayasankar) and the Respondent/ Defendant in O.S.No.447 of 1988 is entitled to get half share in the suit property after having found that the 1st Respondent (1st Plaintiff in O.S.No.692 of 1986) has not absolute right to convey the property as per Sale Deed-Ex.A.3 dated 16.04.1986.

19. Proceeding further, the Learned Counsel for the Appellant contends that the trial Court has failed to take into account that the title conveyed in favour of the 2nd Respondent/ 2nd Plaintiff (in O.S.No.692/1986) has not been proved to have been divested through partition as pleaded and further that the onus is heavily on the Respondents/Plaintiffs to establish the same.

20. Apart from the above, the Learned Counsel for the Appellant contends that the Courts below have incorrectly held that the suit property is a common property and used as a thrashing floor.

21. Expatiating her submissions, the Learned Counsel for the Appellant submits that when the Appellant's vendor Kamalammal and her husband Perumal Padayachi are colluding with the Respondents/ Plaintiffs to defeat the rights of the Appellant, as evidenced by Ex.B.5, the trial Court has gone wrong in observing that the Appellant/Plaintiff has failed to examine them.

22. Yet another contention is projected on behalf of the Appellant to the effect that the trial Court has erroneously held that the Appellant/Plaintiff is not entitled to have any right over the suit property and as such, she is not eligible to claim any compensation for the superstructure put up by the 2nd Respondent (2nd Plaintiff in O.S.No.692/1986).

23. It is the plea of the Learned Counsel for the Appellant that the Rectification Deeds viz., Exs.A.4 and A.5 are cooked up documents and during the pendency of suit, they have come into existence, which fact have not been appreciated by the Courts below in right earnest.

24. Lastly, it is the contention of the Learned Counsel for the Appellant that both the trial Court as well as the First Appellate Court have ignored the validity of Ex.B.6-Sale Deed dated 22.02.1967 when the same has been accepted by the Respondents/Plaintiffs as true and submitted to decree in O.S.No.401 of 1986 filed by the Appellant (Lalithammal) against them.

25.The Learned Senior Counsel for the Cross Objectors submits that the First Appellate Court has erred in not decreeing the suit as prayed for. Also, the Learned Senior Counsel for the Cross Objectors/ Plaintiffs contends that it is nobody's case that the suit property has been left undivided between the respective vendors of the Plaintiffs and the Defendant.

26.The Learned Senior Counsel for the Cross Objectors projects a plea that the First Appellate Court has committed an error in construing the reference to the common enjoyment of the kalam by the respective vendors of the parties by the witnesses as meaning the suit property alone and it actually referred to the moiety west of the suit property also and the same having been admitted to have been allotted to the Defendant's vendor, the First Appellate Court should have accepted the contention of the Plaintiffs that the suit property has been allotted to their vendor.

27.It is the contention of the Learned Senior Counsel for the Cross Objectors that the First Appellate Court should have taken note of the subsequent event that the dismissal of the appeal for non-prosecution by the Appellant and the confirmation of the decree by the trial Court, the Plaintiff has completed the construction of a pucca brick-built house to the knowledge of the Appellant and the decree for half share to each of the parties would cause enormous hardship to the Plaintiff.

28.Finally, the Learned Senior Counsel submits that indeed the First Appellate Court should have granted a decree as prayed for in the suit and if at all the Appellant/Defendant is entitled to half share, which is denied, a compensation ought to have been awarded to the Appellant.

29.In order to appreciate the merits of the controversies/ disputes between the parties, this Court makes a useful reference to the evidence P.W.1 to P.W.4 and D.W.1 and D.W.2.

30.P.W.1, in his evidence, (husband of 1st Respondent/ 1st Plaintiff in O.S.No.692/1986) has deposed that he has a brother by name Perumal, whose wife is Kamalam Ammal and he and his brother have been in police job and in his name, his wife name and his brother's name from the same family, they have purchased properties and since they have been in police job and since it will take some time to obtain permission, therefore, in his brother's wife name and his wife name some properties have been purchased and they get properties at Anaikuppam in S.Nos.866, 865, 1074, 1072, 1073 and those properties have been enjoyed in common and that during the year 1962 he and his

brother have orally partitioned the same, but there is no document for partition and his brother have taken the western portion and he got the eastern portion and in S.Nos.1072, 1073 and 1074 his brother has got the southern side and he got the northern side portion in partition and that during the year 1967 some misunderstanding has erected between him and his brother and therefore, his brother has sold the property to Lalithammal (Appellant) and he has given certain properties with a view to create trouble and based on the sale deeds, the Appellant (Lalithammal) filed O.S.No.535 of 1977 on the file of the trial Court.

31.P.W.1 adds in his evidence that the properties 865 and 866 are situated on the northern side of lands in S.Nos.1072, 1073 and 1074 and the said suit has been filed for taking the motor water on the southern side to the northern side through his land and in that suit, the Appellant has filed one plan Ex.A.1 and that the suit property is on the northern side of properties of S.No.865 and 866 and further on the northern side, the Anaikuppam road is proceeding on his west direction and that the suit property has been enjoyed by him, his brother as Kalam and that the suit property has been a raised ground and Lalithammal's property situated on the southern side of the suit property has been at a 3 feet pit and even the eastern side land of Kalyaniammal has remained as pit and that the length of Kalam is 80 feet and east-west breadth of 35 feet and in Ex.A.1-Plan, Lalithammal has shown the western portion taken by his brother and in Ex.A.1, the northern-eastern portion of his property has been left in white and the Commissioner has inspected the suit property and his plan is Ex.A.2 and even in Ex.A.2-Plan, Lalithammal has shown the western portion and on the eastern side, the pencil marked portion is mentioned by her and the suit filed by Lalithammal has been dismissed because there is no channel and later she has sold the northern side of the properties by plotting out the same and that he has sold the suit property to the 2nd Respondent/ 2nd Plaintiff and the sale deed executed by his wife is Ex.A.3 dated 16.04.1986.

32.P.W.1 in his evidence has also stated that after filing of O.S.No.401 of 1986 by Lalithammal (Appellant), he has come to know that in the sale deed boundary has been mentioned as wrongly and thereafter Rectification Deed-Ex.A.4 dated 30.05.1986 has been registered at the registered office and even in Ex.A.4-Rectification Deed, the mistake has crept in and for rectification of the said mistake, Ex.A.5-Rectification Deed dated 12.06.1986 has been made and that after purchase, the 2nd Respondent/ 2nd Plaintiff has laid the foundation within 10 or 15 days and at that time, Lalitha and her husband Kuppusamy have resided in the adjacent place at a distance of 200 kajams and therefore, they have known about the 2nd Respondent/2nd Plaintiff constructing a building on the eastern side and in

O.S.No.401 of 1986 in the western side of the property measuring 40 x 35 feet either himself or his vendor are not claiming any right and suit O.S.No.692 of 1986 has been filed to declare the right of 2nd Plaintiff on the eastern side of the property (before that it belongs to his wife) and also in the said suit, an injunction has been also sought for and Ex.A.6 is patta book for the entire property and Ex.A.7 is the patta tax receipt for the year 1986.

33.P.W.1 (in his cross examination) has deposed that during the year 1962 oral partition has taken place and there is no record to show that in kalam eastern portion has been allotted to his wife and there is no deeds in measurement in regard to the measurements of suit plan in O.S.No.401 of 1986 and that of the Exs.B.2 and B.3-Measurements and in Exs.B.3 and B.4-Plan copy and in Land Surveyor's Report the entire portion ABCDE has been shown to be in possession of Lalithammal for which no objection has been filed by him and that for proceeding to kalam there is a way of 2, 3 feet on the western side and he has not mentioned the pathway detail and in Exs.A.1, A.2, B.3 he has not shown the pathway.

34.P.W.2 (the 2nd Plaintiff in O.S.No.692/1986 and 1st Defendant in O.S.No.401/1986) in his evidence has deposed that he is the Defendant in O.S.No.447 of 1988 and that he has purchased the suit property from 1st Respondent/ 1st Plaintiff-Rajalakshmi and the property he purchased has remained as a kalam property and that at the time of writing the sale deed, it is wrongly mentioned as on the western side and that the mistake that has crept in regard to the western side of the portion in the sale deed has come to be known only after filing of the suit O.S.No.401/1986 by Lalithammal and that he has not endeavoured to trespass into the western side portion of the property and therefore, a Rectification Deed-Ex.A.4 has been executed and since in the said document, the property details have been correctly mentioned, but in the recitals mistake has crept in and therefore, another Rectification Deed-Ex.A.6 has been executed.

35.Continuing further, it is the evidence of P.W.2 that he and 1st Respondent/1st Plaintiff have filed O.S.No.692/1986 for an encroachment to be made on the eastern side portion of the property purchased and the suit O.S.No.401/1986 is on the western side, he has no objection that decree being passed to that effect and that in O.S.No.447 of 1988 he has constructed a house in his portion which fact is known to Lalithammal, the said suit is to be dismissed and since she has remained quiet after knowing the construction put up by him she is not entitled to get possession of the same and since he has spent for construction of the house he is to be paid the compensation.

36.P.W.2 in his cross examination has deposed that 80 x 35 feet kalam has been put into use and through Anaikuppam northern side road one can reach 80 x 35 feet kalam and since there has been a pathway through Venkatakumar land through passage also one can reach kalam, but there is no other way.

37.P.W.3 in his evidence has deposed that he has to go past the suit property to reach his property and that Survey Nos.850, 851/3, 855 properties belonged to him and on the western side of his property Krishnamurthy's property is situated and earlier it belonged to Kalyani and on the western side there is a property belonging to that of Srinivasa Padayachi and Perumal Padayachi and that next to Anaikuppam road southern side there is a Kalathumedu and 20 years before regarding the pathway there has been a small problem between Perumal and Srinivasan and the purchase made by Lalithammal two or three years ago there has been a dispute and earlier Perumal and Srinivasan used to keep the kalam and after the pathway dispute, a compromise has been entered into and they have enjoyed the kalam commonly and he has heard that the eastern portion of kalam has been allotted to Srinivasan and western side has been allotted to Perumal on partition and this he has come to know after the purchase made by Lalithammal, one or two years latter.

38.D.W.1 (the Appellant-Lalithammal's husband) in his evidence has deposed that he is the husband of Plaintiff-Lalithammal in O.S.No.401 of 1986 and O.S.No.447 of 1988 and that the ABCDEF portion in O.S.No.401 of 1986 belongs to Lalithammal and that the said portion has been purchased by Kamalammal as per Ex.B.1-Sale Deed dated 17.06.1980 and that on the northern side of Ex.B.1-Sale Deed dated 17.06.1960 is Anaikuppam Road and on the western side of the property, earlier it is a land of Hanumantha Rao and now it is a land of Selvaraj and on the eastern side of the property earlier it is a land of Kalyani and not it belongs to L.Venkatakumar and on the southern side of Ex.B.1-Sale Deed it is a land of Rajalakshmi Ammal for which the correct survey number is 866 and in Ex.B.1-Sale Deed, the survey number is wrongly mentioned as 865 and that he has purchased the property by means of Ex.B.6-Sale Deed dated 22.02.1967 and even in that sale deed, the survey number is wrongly mentioned as 865 and the boundary has been properly written and after their purchase, they have enjoyed the property. Before the Sub Court in O.S.No.535/77 there has been a proceeding in regard to the channel dispute and in that case he filed a plan which is Ex.A.1 and Ex.B.2 is the plaint copy of O.S.No.535/77 and in Ex.B.2-Plaint in O.S.No.535/77 the present suit property has been mentioned as 7th item and in Ex.A.1-Plan the eastern side portion of the suit property is Venkatakumar land and in Ex.A.1-Plan the northern-eastern end has

been shown in white and that portion at the time of filing of the suit has been encroached upon by Venkatakumar and in the suit, he has shown the portion which has been in his enjoyment in red colour and the north-eastern end which has been left as white in the plan has not been mentioned as that of in enjoyment of Rajalakshmi or she has no right of the same.

39.It is the further evidence of D.W.1 that the Commissioner has inspected the property in that suit and has filed Ex.A.2-Plan (with report) wherein the north-eastern end portion plan shown belonged to Rajalakshmi and after the visit of the Commissioner, he has grabbed the possession of the land and therefore, the entire portion of ABCDE has shown in the earlier suit has come into his enjoyment and it is wrongly stated that the suit property has been used as a thrashing floor (kalam) and it is not correct to state that eastern side half portion has been taken by Rajalakshmi and western side half portion has been taken by Kamalammal and further it is not correct to state that eastern side portion of Rajalakshmi has been in her enjoyment.

40.The categorical evidence of D.W.1 is that either P.W.1 or his wife at any point of time in the suit property has claimed any right as to the existence of his thrashing floor (kalam) and there is enmity between P.W.1 and Rajalakshmi. A false sale deed has been given to the 2nd Respondent (Udayasankar) and the said sale deed has been given originally as on the western side and after coming to know of the said sale deed, he has filed a suit and that the 2nd Respondent/2nd Plaintiff (Udayasankar), after his purchase has come to the property to lay stone and before that O.S.No.401 of 1986 has been filed and injunction order has been obtained and therefore, the 2nd Respondent/ 2nd Plaintiff has not laid the stone and since a claim cannot be made on the western side of the property, a rectification deed has been filed later to say that it is an eastern side portion and O.S.No.692 of 1986 has been filed and an injunction order has been passed and during March 1987 he has vacated from this village and has gone to Pondicherry and from the year 1987 March he has residing at Pondicherry and Ex.B.7 is the letter dated 25.04.1987 which has come to him Pondicherry and initially he has resided in a rented house and later during November he gone to a different house and Ex.B.8 is the Voters Card and it is not correct to state that on 25.01.1988 the 2nd Respondent/2nd Plaintiff has laid a foundation which he has seen personally and that he has not raised any objection and at that time, he has been at Pondicherry and during April 1987 again he has taken his wife to Madras for treatment and he has seen the act of laying foundation when he come as a tenant during March 1988 and that he has left the house for rent and immediately he has preferred the suit and since his wife has not been well he has gone to Madras again and later during May 1988 O.S.No.447 of 99 has been filed and

has prayed for injunction and not to construct the building and that he has come and inspected the place and submitted a report.

41.D.W.1 proceeds in his evidence that it is wrong to state that Perumal and Srinivasana is in inimical terms, but they are united only and that Perumal will not come and give evidence and that there is enmity between him and Perumal.

42.Continuing further, it is the evidence of D.W.1 in his cross examination that in Ex.B.3-Plan it is shown that the suit properties one portion is in occupation of Venkatakumar and he cannot say from Ex.B.3-Plan in which portion the said Venkatakumar is in enjoyment and Venkatakumar has been in enjoyment of an extent of south-north 100, 110 and east-west approximately 10 feet and during the year 1977 he has trespassed into the suit property and after the sale of Dr.Krishnamurthy, Venkatakumar has sold the property and that he has not sold any portion in the suit property.

43.D.W.1 goes on to add in his evidence that Venkatakumar in the suit property used to bring sugarcane and will keep the same in the suit property and will load the sugarcane in the tractor and he has no right to do so and during the year 1979 he has taken possession from the said Venkatakumar and in Ex.B.3-Plan a major portion of the eastern side has been in enjoyment of Venkatakumar and in Ex.B.3-Plan, the extent of different survey numbers have been written and in Ex.B.3-Plan, an extent of 11453 square feet is a property and that it will be 25, 26 cents and in O.S.No.535 of 1977 the property in enjoyment of Venkatakumar has been shown as the property in their possession and that he has not marked in colour the Venkatakumar's enjoyment portion and in Ex.B.2 in O.S.No.535/77 all property purchased from Perumal has been shown in red colour and in Ex.B.2-Plan in O.S.No.535/77 he has not mentioned that Venkatakumar is in possession of a portion of the property.

44.Continuing further, D.W.1 has deposed that the suit property 80 x 35 feet will be approximately 7 or 8 cents and that he has not in enjoyment of $45\frac{3}{4}$ cent continuously which is situated on the southern side from Anaikuppam road. But in Ex.B.6-Sale Deed it is mentioned as $45\frac{3}{4}$ cent has been given in sale to him and in Survey Nos.865, 866 his possession will be in one acre 68 cents. But it is wrong if it is mentioned in the sale deed that 2 acres and $13\frac{1}{4}$ cents is in possession and that in his possession 1 acre and 68 cents will be there and in Ex.A.14-Sale Deed dated 17.06.1960 it is mentioned as $45\frac{3}{4}$ cents in S.No.865 and 15 cents in S.No.866 and his entire property mentioned in Ex.A.14-Sale Deed dated 17.06.1960 is not in his possession and that the extent mentioned in Ex.A.14-Sale Deed dated 17.06.1960 is mentioned in Ex.B.6 and that he is in enjoyment

of the property and has enjoyed by Perumal and Kamalammal and further, in Ex.A.14-Sale Deed dated 17.06.1960 approximate extent of 28 cents and one 15 cents are in his possession and in Ex.B.6-Sale Deed 45 $\frac{3}{4}$ cents and 15 cents are shown in excess.

45.D.W.1's evidence is also to the effect that the completion of construction during February made by 2nd Respondent/ 2nd Plaintiff he has come to know about it during March month and it is not correct to state that the suit property in O.S.No.692/1986 has been in enjoyment of Srinivasa and Rajalakshmi as thrashing floor (kalam).

46.D.W.2 in his evidence has deposed that his house is situated on the western side of the suit property and that the suit property has not been enjoyed by Rajalakshmi and Srinivasan and that the raised ground portion of the suit property to his knowledge has not been used as thrashing floor (kalam) and that the 2nd Respondent/2nd Plaintiff has put up a foundation on the eastern side one year ago and that either Dr.Krishnamurthy or Venkatakumar in the suit property has not enjoyed the thrashing floor at any point of time.

47.In Ex.C.1-Advocate Commissioner's Report dated 07.06.1988, it is mentioned that the suit property measures east to west 40 feet and north to south 35 feet and that the suit property is located east to Venkatakumar's land (sugarcane raised) west of Selvaraju's house and granting north of Anaikuppam road and south of Rajalakshmi's land and in the suit property the foundation is raised to an extent of 2 feet height from the ground and near the basement cement mixtures is found and further on the western side of the suit property heap of bricks, heap of sand and heap of gravel have been found and that the basement seems to have been laid about a month back at the time of his inspection construction work has not been in progress.

48.Ex.A.2 is the certified copy of Commissioner's Report in I.A.No.1987 of 1977 in O.S.No.535 of 1977 on the file of Learned District Munsif,Cuddalore. In the said suit, the Appellant (Lalithammal) has figured as Plaintiff and the Defendants are S.Srinivasa Padayachi and one Rajalakshmi. The said suit relates to a channel dispute/ controversy between the parties thereto. Ex.A.3 is the certified copy of Sale Deed dated 16.04.1986 executed by Rajalakshmi to and in favour of the 2nd Respondent/2nd Plaintiff (Udayasankar) in respect of T.S.No.866 measuring an extent of east-west 40 feet and north-west 35 feet, aggregating in all an extent of 1,400 square feet.

49.Ex.A.4 is the Rectification Deed dated 30.05.1986 executed by Rajalakshmi to and in favour of 2nd Respondent/2nd Plaintiff (S.Udayasankar) wherein it is mentioned that in Document No.602/1986

in page No.267 to 269 in Cuddalore Third Sub Registrar's Office Book 1 Part I, 1031 in page 8 instead of Lalithammal's share of vacant land on eastern site it should be read as on the western side and in the aforesaid page at line No.2 the Rajalakshmi's house on the eastern side must be read as Venkatakumar's land on western side and that there is no change in total extent and in survey number also.

50.In Ex.A.5-Rectification Deed dated 12.06.1986 executed by Rajalakshmi to and in favour of the 2nd Respondent/ 2nd Plaintiff (Udayasankar), it is inter alia mentioned that the Rectification Deed is registered as Document No.907/86 in Cuddalore Registrar's Office in Book 1 Vol.1034 at page 53 to 55 and in the four boundaries in line 1 instead of Lalithammal's vacant land on the western it should be read as on the western side and in page 8 of the sale deed in line No.1 the house of Kandasamy's son Selvaraj on the eastern side must be read as on the western side of Venkatakumar and further, in survey number and in total extent there are no changes.

51.Ex.A.6 is the UDR Patta No.24 standing in the name of Rajalakshmi Ammal in respect of S.No.865 punja 1 acre 38 cents and in S.No.866 punja land 3 acres and 13 cents. Ex.A.7 is the kists receipt paid by Rajalakshmi Ammal for fasli 1395 as regards as Patta No.24.

52.Ex.A.14 is the Sale Deed dated 17.06.1960 executed by Hanumantha Rao to and in favour of Kamalammal in respect of item 1 land in T.S.No.865 punja A1 at measuring an extent of 45 $\frac{3}{4}$ cents viz., 19965, in respect of item 2 T.S.No.866/A3 measuring an extent of 15 cents viz., 6540 square feet of land.

53.Ex.A.15 is the printed copy of Judgment dated 30.6.1980 in O.S.No.535 of 1977 on the file of the Learned District Munsif, Cuddalore in and by which the Appellant (Lalithammal has filed a suit for declaration, injunction, for mandatory injunction and for damages of Rs.1500/- against one Srinivasa Padayachi and Rajalakshmi.

54.A perusal of Ex.A.15-Judgment in O.S.No.535 of 1977 indicates that the Appellant (Lalithammal) who figured as Plaintiff in the said suit has been held to have failed to prove that she has got right through the channels 'E H L J K' 'F B L M' 'G M' 'A M' and 'M R S T P' and further, she failed to prove that she entitled to damages and also recovery of possession and consequently, the said suit has ended in dismissal.

55.Ex.B.1 is the certified copy of sale deed dated 17.06.1960 executed by Hanumantha Rao to and in favour of Kamalam Ammal which is equivalent to Ex.A.14. Ex.B.2 is the copy of the Complaint filed by the Appellant (Lalithammal) as Plaintiff in O.S.No.535 of 1977 on the

file of Learned District Munsif, Cuddalore. It is relevant for this Court to point out that the Appellant (Lalithammal) in para 15 of the Plaint in O.S.No.535 of 1977 on the file of trial Court has sought a relief of declaration to the effect she is entitled to take water from the wells in T.S.No.1073 and 866 to the several portions of her properties in T.S.No.866 and 865 and 1073 and 1074 shown red in the plaint plan also a right to go through the lands of defendants for taking carts and also for going by foot and for an injunction restraining the defendants from interfering with plaintiff's such right and from using the channels aforesaid to take water to a land etc., to go through the respective fields by the cart and also for awarding damages of Rs.1,500/- etc.

56.In Ex.B.3-Plan of Ward No.7, Block No.12, T.S.Nos.865/Part & 866/Part [C.5] [produced in O.S.No.401 of 1986], it is mentioned as follows:

"847	Sq. Feet +	Sq. Feet -
1.53 x 86/2	= 2279	
2.60-53 x 81 + 86/2	= 584 ½	
3.152-60 x 81/2	= 3726	
4.152 x 64/2	= 4864	

Total Area of Block No-II = 11453 ½

848

Lands belonging to
Thiru L.Venkatakumar = 1125 Sq. Feet

Lands belonging to the
Plaintiff Tmt.H.Lalitha = 10328 ½ Sq. Feet

Note: This field has been measured on ground of the fixing the old points and measurements recorded by me for area calculation.

Sd/-

Inspector of S & L.Rs
Cuddalore.

23.4.78, 30.4.78 &
1.5.78

57.In Ex.B.4-Report of the Inspector of Survey and Land Records Cuddalore [filed in I.A.No.149/78, I.A.No.1987/77 in O.S.No.535/77 on the file of trial Court] dated 22.04.1986 in paragraph 2 to 6, it is mentioned hereunder:

"2.T.S.No.1072, 1073, 1074 and portion of 863 which is in the enjoyment of both the plaintiff and the defendants is in one contiguous block and this is mentioned as block No.'I' below. Further, T.S.No.865 portions of 866 and 863 forms another contiguous block and this is mentioned as block No.'II' below. This block No.'II' is divided into three portions by means of two new fences. Of this first portion comprises of portions of T.S.No.865 and 866, which is in the enjoyment of the plaintiff forms the northern most part of block No.'II'. The second portion of block No.'II' which is in the enjoyment of the plaintiff forms the western most portion of block No.'II'. The eastern and the southern portion of block No.'II' which is in the enjoyment of the defendants and the disputed channel in T.S.No.866 and 865 and portion of 863 forms the third portion of block No.'II'. In this portion there is an old dilapidated well in the tank in T.S.No.863. This well has an outer diameter of 12 Ft and the depth of the well from the parapet wall is 4 Ft 5 inches. Further there is borewell situate north of this well in T.S.No.866. This borewell and the well inside the tank in T.S.No.863 are connected by a 'T' joint to an electric motor which is situated in a new thatched shed. This motor is exactly situated on the demarcating line between 866 and 863. The location of the well, borewell and the thatched shed are shown in the accompanying plan.

3.Block NO.'I; This block consisting of T.S.No.1072, 1073, 1074 and portion of 863. This is divided into two halves, the northern portion is in the enjoyment of the defendants and the southern portion is in the enjoyment of the plaintiff. There is a channel which is under dispute, starting from the electric motor in T.S.No.1073, proceeds west to the western boundary of T.S.No.1073 and then north along this boundary and then eastwards. This east bound portion of the channel runs approximately in the middle of block No.'I'. There is a broken portion of a cement tub in this eastbound portion of the channel and abutting north into the northern portion of block No.'I' as shown in the plan. There is an open round well and a motorshed in T.S.No.1073. The outer diameter of this open round well is 17 Ft 6 inches, and the motorshed having three walls (south east and north) and the western wall forms part and parcel of the adjacent room belonging to the plaintiff. This shed measures 10 Ft 6 inches east west and 9 Ft 8 inches north south, with an electric motor and pumpset in which both the defendants and the plaintiff have 50% share each. The portion south of the channel measures 79959 S.Ft. of this

an area of 171 S.Ft. goes to the defendants being the 50% share of the well and the motorshed. Thus the net area south of the channel in the enjoyment of the plaintiff comes to 79783 S.Ft. The portion north of the channel in the enjoyment of the defendants measures as follows:-

T.S.No.1072, portions of 1073, 1074 and 863 excluding the area of the disputed channel.	79710 $\frac{1}{2}$ S.Ft.
50% share of the motorshed and the well situate in plaintiff's portion	3830 S.Ft.
	171 S.Ft.

Total area	83711 $\frac{1}{2}$ S.Ft.

TOTAL AREA IN BLOCK No.'I' portion south of the channel in possession of plaintiff	79788 S.Ft.
Portion north of the channel in possession of the defendants and 50% share of well and motorshed	83711 $\frac{1}{2}$ S.Ft.
Area of the channel in dispute	2654 S.Ft.

Total area	166153 $\frac{1}{2}$ S.Ft.

Hence the 50% share of the plaintiff comes to Rs.83076 $\frac{3}{4}$ S.Ft. The southern half and the channel in dispute put together measures only 82442 S.Ft. Hence the channel now under dispute is in the plaintiff's portion and also an area of 634 $\frac{3}{4}$ or 635. S.Ft. north of the channel belonging to the plaintiff is encroached by the defendants.

4.Block No.'II'. First portion of this block belonging to the plaintiff measures 10328 $\frac{1}{2}$ S.Ft. (after deducting an area of 1125 S.Ft. belonging to Shri L.Venkatakumar from the total area of 11453 $\frac{1}{2}$ S. Ft.) Second portion of this block No.'II' which is in the enjoyment of the plaintiff measures 60959 S.Ft. excluding the area of the channel now under dispute which forms the eastern boundary of the second portion. Hence the total area in the enjoyment of the plaintiff in block NO.'II' measures 71287 $\frac{1}{2}$ S.Ft. But the total area due to the plaintiff in block No.'II' as per the plaint and the documents is 72087 $\frac{1}{2}$ S.Ft. Hence an area of 800 S.Ft. is encroached by the defendants by the way of putting two new fences. The area of the channel in this block under dispute measures only 852 S.Ft. Thus 800 S.Ft. of 852 S.Ft. of the channel in block No.'II' is in the

plaintiff's portion. Further an area of 4270. S.Ft. of T.S.No.863 including the portion of the channel from the dilapidated well in the tank in T.S.No.863 but excluding this well, apart from the area of 3830 S.Ft. already included in Block No.'I' is in the enjoyment of the defendants.

5.The important physical features along with their measurements and locations are shown in the accompanying plan of the suit properties.

6.The following survey stones were found missing. A. Offset Point 25 P, J, G, F, E and D. And their respective positions have been located by measuring from other stones. The survey stone at the junction of T.S.No.866, 868 and 1074 (Stone at 'T') in the defendant's portion was found to have been freshly fixed in a point $1 \frac{1}{2}$ Ft west of its actual position and was packed with fresh loose soil."

58.Ex.B.6 is the Sale Deed dated 22.02.1967 executed by Kamalammal to and in favour of the Appellant (Lalithammal).

59.A perusal of the trial Court common Jugdment in O.S.No.401 of 1986, 692 of 1986 and 447 of 1988 indicates that in paragraph 16, it is observed that the Appellant/Defendant has purchased the suit property as per Ex.A.14-Sale Deed dated 17.06.1960 and only the said property has been sold to Appellant/Defendant by Kamalammal as per Ex.B.6-Sale Deed dated 22.02.1967 etc. Further, it is admitted by the parties that in Ex.A.14 the first item survey number viz., T.S.No. Punjai 865/A1 has been wrongly mentioned and the correct survey number ought to have been 866. If one has to take the first item as T.S.No.866, then, under the first item $45 \frac{3}{4}$ cents and in the second item 15 cents should have been purchased and in aggregating $60 \frac{3}{4}$ cents should have been purchased. In Ex.A.14 original Sale Deed dated 17.06.1960 executed by Kamalammal to and in favour of P.N.Hanumantha Rao. In the last page of the document one P.H.Narasimha, Arumuga Padayachi S/o.Veerappa Padayachi, Vanniyarpalayam and P.Jayachandra Padayachi S/o.Periyaswamy, Vanniyarpalayam have affixed their signatures as witnesses. The name of the scribe of Ex.A.14-Sale Deed dated 17.06.1960 is mentioned as K.Thangavelu, Vakil Clerk. Unfortunately, the aforesaid 3 witnesses mentioned in Ex.A.14-Sale Deed and the scribe K.Thangavelu, Vakil Clerk have not been examined as a witness on either side before the trial Court. Further, they have also not been examined as a Court witness before the trial Court.

60.However, D.W.1 (Muthuswamy/Appellant-Lalitha's husband) in his cross examination has categorically stated that he is not in possession of the entire property mentioned in Ex.A.14-Sale Deed

dated 17.06.1960 and that approximately 28 cents and 15 cents mentioned in Ex.A.14-Sale Deed is in his enjoyment and that 28 cents and another 15 cents mentioned in Ex.A.14-Sale Deed have not been in enjoyment of Perumal and Kamalammal. But in his sale deed in Ex.B.6, 45 $\frac{3}{4}$ cents and 15 cents have been mentioned in excess. In view of the categorical admission of the Appellant/Defendant's husband in his evidence as D.W.1 before the trial Court, the trial Court has clearly observed in para 15 of its Judgment that as per Ex.B.6-Sale Deed dated 22.02.1967 executed by Kamalammal in favour of Appellant-Lalithammal have not enjoyed the property as per measurements found therein. No doubt, O.S.No.535 of 1977 filed by the Appellant-Lalitha against the 2nd Defendant (Rajalakshmi) and the 1st Defendant (Srinivasa Padayachi) have been dismissed by the trial Court without costs on 30.06.1980.

61.At this juncture, it is relevant for this Court to make a pertinent mention that the trial Court in paragraph 18 of its common Judgment has clearly observed that D.W.1 in his cross examination has clearly mentioned that in Ex.B.3-Plan copy, it is mentioned that in one portion is in enjoyment of Venkatakumar. But from Ex.B.3-Plan, he cannot say Venkatakumar is in enjoyment of which portion but Venkatakumar south-west 100 feet, 110 feet approximately; east-west 10 feet approximately has been in enjoyment of the same from the year 1977 and that Dr.Krishnamoorthy has purchased and later Venkatakumar has purchased and that not even a single portion has been sold to Venkatakumar and that the said Venkatakumar has been enjoyment of major portion on eastern side of the Ex.B.3 property. Further, D.W.1 has not stated in his evidence as to when from Kalyani Ammal, Venkatakumar has purchased.

62.D.W.2 in his evidence has stated that the suit property after purchase by Muthuswamy Teacher has been in his enjoyment and it is not in enjoyment of anybody and that either Dr.Krishnamoorthy or Venkatakumar has not enjoyed the suit property. Even though the trial Court, in para 18 of its Judgment, has consequently observed that it is wrong to state that Venkatakumar has encroached a portion of suit property and therefore, in Exs.A.1 and A.2, it is separately shown and further the western side portion it is separately shown in Exs.A.1 and A.2 as stated by the Plaintiffs it comes to be known that it has come to the 1st Plaintiff and allotted to her, is not a correct one, in the considered opinion of this Court because of the fact that there is no clarity of evidence in this regard. Also that before the trial Court Venkatakumar and Muthuswamy (Teacher) and also, Kalyaniammal have not been examined as witnesses by either of the parties. When it is not the case of the Appellant/Defendant that Venkatakumar in previous suit has encroached upon and therefore, that portion has been left out, then notwithstanding the averment made in

para 4 of O.S.No.535/1977 to the effect that 'The property is purchased by the plaintiff from Perumal and his wife are shown in red colour in the plan filed herein document No.1 while the other properties which belonged to the defendants (second defendant being the wife of first defendant)', this Court opines that there is insufficiency of evidence, lacking definite clarity on the point at issue. Further, this Court is of the considered view that Kalayaniammal and Venkatakumar are the proper persons as who can speak/depose in regard to the enjoyment of Venkatakumar of an extent of south-west 100 feet, east-west 10 feet approximately. As such, this Court opines that those persons are the appropriate persons who can throw more light on the subject matter of dispute involved between the parties and they are to be necessarily examined as witnesses before the trial Court.

63.That apart, if the suit property has been used as thrashing floor (kalam), then, certainly it will find a place in the Revenue Record like FM Book and in chitta. But Revenue Records like, FM book and chitta have not been produced and filed before the trial Court by the parties concerned to substantiate their claim.

64.Further, Rajalakshmi Ammal, who originally executed Ex.A.3-Sale Deed dated 16.04.1986 in favour of the 2nd Respondent/2nd Plaintiff and later who executed Exs.A.4 and A.5-Rectification Deeds dated 30.05.1986 and 12.06.1986 has not been examined as witnesses by the parties before the trial Court. Though Rajalakshmi Ammal's husband P.W.1 has been examined as a witness before the trial Court on behalf of the Plaintiffs, yet, the right and competent person to speak about the mistakes that have crept in in Ex.A.3-Sale Deed dated 16.04.1986 and alter Exs.A.4 and A.5-Rectification Deeds dated 30.05.1986 and 12.06.1986 have been executed his only Rajalakshmi (1st Plaintiff) and therefore, this Court feels that she should be examined as a witness before the trial Court even as a Court witness if the Plaintiffs failed or omit to examine on their side.

65.Without examining the Rajalakshmi (the Plaintiff) as a witness before the trial Court, the trial Court, in para 20 of its Judgment in the suits, has held that the Ex.A.3-Sale Deed dated 16.04.1986 and the Rectification Deeds Exs.A.4 and A.5 dated 30.05.1986 and 12.06.1986 are true and legally valid one and the said finding arrived at by the trial Court in the considered opinion of this Court is not based on ground realities of the case.

66.The trial Court also, in para 20 of its Judgment, has observed that Ex.B.6-Sale Deed dated 22.02.1967 executed by Kamalammal to and in favour of Lalithammal is not a true and legally valid document. The Respondents/Plaintiffs in O.S.No.692 of 1986 have

not filed the suit for cancellation of Ex.B.6-Sale Deed dated 22.02.1967 executed by Kamalammal to and in favour of Lalithammal. Admittedly, in O.S.No.692 of 1986 the Respondents/Plaintiffs have not sought the relief of declaration even that Ex.B.6-Sale Deed is not an invalid and not binding one. They have not valued the suit based on the document that has been executed. When the parties are suing one can obtain cancellation before getting any other relief on the basis that Ex.B.6-Sale Deed dated 22.02.1967 executed by Kamalammal to and in favour of Lalithammal is not binding on them and whether the cancellation is formally asked for or not, it is impliedly asked for in the considered opinion of this Court and such a suit is to be construed as one for cancellation. Even if no relief of cancellation of document is called for based on the circumstances of the case, the Plaintiffs in a suit can ask for mere declaration that the said sale deed is not binding on them and they are to pay necessarily the requisite Court Fee as per Tamil Nadu Court Fees and Suits Valuation Act, 1955, as opined by this Court.

67. In short, the trial Court's finding in paragraph 20 of its common Judgment that Ex.B.6-Sale Deed dated 22.02.1967 obtained by the Appellant/Defendant (Lalitha) from Kamalammal is not a true and legally valid document, is an incorrect one when the Respondents/Plaintiffs have not sought for either cancellation of Ex.B.6-Sale Deed dated 22.02.1967 or they have not prayed for declaration that Ex.B.6-Sale Deed is not binding on them or they have also not sought the relief of setting aside the Sale Deed.

68. Apart from the above, it is to be pointed out that to establish the existence of thrashing floor or kalam, the Revenue Records like FM Book, chitta details are ordinarily to be maintained by Revenue Tahsildar/V.A.O. concerned. However, since these records have not been filed before the trial Court, this Court feels that they are to be summoned from the custody of the Revenue Authorities and are to be marked before the trial Court after examining the concerned person/persons (from Revenue Department), in the manner known to law.

69. The First Appellate Court, while delivering the Judgment separately in A.S.No.12 of 1989 (arising out of O.S.No.692/1986) and A.S.No.14 of 1989 (arising out of O.S.No.447/1989), on 25.03.1991, has held, in para 16, that during Ex.A.1-Plan Period the thrashing floor /kalam has been enjoyed in common and therefore, it appears that it has been left as 'white' and therefore, it is evident that in the suit property, the 1st Respondent/Plaintiff-Rajalakshmi (in O.S.No.692 of 1986) has no exclusive right and that being so, since the suit property has been sold by the 1st Respondent/Plaintiff to the 2nd Respondent/ 2nd Plaintiff that sale deed is not a valid one and

even though Ex.A.3-Sale Deed dated 16.04.1986 is a true one, the 1st Respondent/Plaintiff has no right to sell the entire suit property and in the suit property the 1st Respondent/Plaintiff has got only a half right and resultantly in respect of the half share of the suit property granted the relief of declaration to the 2nd Respondent/2nd Plaintiff and also in that half share granted the relief of injunction to the 2nd Respondent/2nd Plaintiff and further held that the Appellant/Defendant has got half right in the suit property and accordingly, allowed the appeals in part without costs. The said observation of the First Appellate Court are not based on real and correct facts and surrounding circumstances of the case which float on the surface.

70. When Ex.B.6-Sale Deed dated 22.02.1967 has been accepted by Respondents (in O.S.No.401 of 1986) as true and submitted to decree in O.S.No.401 of 1986 filed by the Appellant, then, both the Courts have not adverted to this aspect in a proper perspective in assessing the validity of Ex.B.6-Sale Deed dated 22.02.1967.

71. It is to be pertinently pointed out by this Court that Section 51 of the Transfer of Property Act is a general provision. Section 63A of the Transfer of Property Act is a special section for improvement. As a matter of fact, Section 51 of the Transfer of Property Act is based on the principle that he who seeks Equity must do equity. When an improvement is made under a defective title, a claim for improvement in law is to be made before eviction, as opined by this Court. Indeed, an 'improvement' means anything done to the property resulting in enhancing its value. Even a Representative-in-Interest can also make a claim for improvement. Admittedly, for the improvement made, compensation cannot be paid on present value to apply the ingredients of Section 51 of the Transfer of Property Act, a person claiming relief must be a transferee of an immovable property and he made improvement in good faith and further that he is evicted by a person having better title. Moreover, an individual claiming compensation for improvement ought to have believed that he is absolutely entitled to it.

72. A perusal of the Judgment in O.S.No.447 of 1988 indicates that the trial Court for Issue No.5 'Whether the claim of the Defendant that he has spent a sum of Rs.18,000/- is correct?', the trial Court has not given a categorical and clear-cut finding as to whether the Defendant is entitled to claim the sum of Rs.18,000/- spent towards improvement and in fact, this Court is of the considered view that the trial Court has not adverted to the well laid down principles in respect of the ingredients of Section 51 of the Transfer of Property Act and also not rendered its decision/finding as per Order 14 Rule 2 of Civil Procedure Code.

Moreover, the trial Court has not followed Order 20 Rule 5 mandate by not stating its finding/decision with requisite reason thereof in regard to the Issue No.5 in O.S.No.447 of 1988. As such, not assigning the reasons for arriving at a decision based on the issue framed is unsustainable and illegal one, in the eye of law.

73.Even the First Appellate Court also in A.S.No.14 of 1989 arising out of O.S.No.447 of 1988 has not dealt with or touched upon the point for determination whether the Respondent/Defendant is entitled to claim a sum of Rs.18,000/- for the improvement so made and in this regard, the non framing of point for determination [based on pleadings of the parties] is not satisfying the requirements of Order 41 Rule 31 of Civil Procedure Code and the Appellate Court Judgment in A.S.No.14 of 1989 also suffers from this patent illegality, in the considered opinion of this Court.

74.As far as the present Appeals and Cross Objection are concerned, this Court is of the considered view that the existing oral and documentary evidence available on record are not sufficient or good enough so as to enable this Court to come to a definite conclusion. If on the basis of insufficiency or incomplete evidence available on record, if this Court deals with the subject matter in issue in suit and in appeals, and express any opinion on the merits of the matter, then, it will undoubtedly cause serious prejudice to the rights of parties. Therefore, this Court opines that in the cases on hand, there is no clarity of evidence available on record. Therefore, this Court, without going into the merits of the matter, for proper adjudication of the case, in order to provide an opportunity to respective parties, to do complete justice between the parties, to secure the ends of justice and after manifestly applying the process of Judicial thinking, remits back the entire subject matter in issue and accordingly, in the interest of justice, sets aside both the trial Court Judgment in O.S.Nos.692 of 1986 and 447 of 1988 as well as the Judgment in A.S.Nos.12 and 14 of 1989 of the First Appellate Court and allows the Appeals as well as the Cross Appeal and at this stage, this Court holds that answering of Substantial Questions of Law 1 and 2 in both the Appeals do not arise for consideration and accordingly, to promote substantial cause of justice, this Court leaves them open.

75.In the result, both the Second Appeals and Cross Appeal are allowed, leaving the parties to bear their own costs. The Judgment and Decree of the trial Court in O.S.Nos.692 of 1986 and 447 of 1988 dated 28.03.1989 as well as the Judgment and Decree of the First Appellate Court in in A.S.Nos.12 and 14 of 1989 dated 25.03.1991 are set aside for the reasons assigned in these Appeals.

76.It is open to the parties to examine the Revenue Tahsildar, V.A.O., Venkatakumar, Muthuswamy (Teacher), Kalyaniammal, Rajalakshmi, as their witnesses [to come to the conclusion whether thrashing floor (kalam) has been enjoyed in common or the same finds a place in any of the documents because of the fact that the suit property thrashing floor (kalam) is inter-linked] and to find out the truth of the matter. It is also open to the trial Court to examine them as Court witnesses to prevent an aberration of justice.

77.Liberty is granted to the parties to agitate the issue of alleged improvement made by the Defendant to an extent of Rs.18,000/- before the trial Court and it is open to the parties to raise all factual and legal issues in this regard, in the interest of justice.

78.As a matter of fact, the oral evidence and documentary evidence available on record before the trial Court are scrappy jumpy besides there being lack of clarity of evidence. It is open to the parties to amend the Plaints in O.S.Nos.692 of 1986 and 447 of 1988 if they are so advised in the manner known to law and in accordance with law.

79.Since both the suits are of year 1986 and 1989, the trial Court is directed to dispose them within a period of six months from the date of receipt of copy of this Judgment. The parties are directed to lend their support and co-operation to the trial Court in regard to the completion of trial proceedings, within the time determined by this Court. The trial Court is also directed to permit the parties to let in additional, oral and documentary evidence, if they so desire/advised.

Sgl

Sd/-

Asst. Registrar (CS-III)

//True Copy//

Sub Asst. Registrar

To

- 1.The Sub Court, Cuddalore.
- 2.The District Munsif Court, Cuddalore.

GV(CO)
SR/5.7.2012.

JUDGMENTS IN
S.A.No.131 of 1993 and
S.A.No.1181 of 1995 and
Cross Objection No.48 of 1997