Subanandaraj Vs. Mani

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Court : Chennai Madurai

Decided On : May-11-2016

Judge : P.R. Shivakumar

Appeal No. : S.A.(MD).No. 388 of 2013 & M.P.(MD).No. 1 of 2013

Appellant : Subanandaraj

Respondent : Mani

Judgement :

(Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 28.01.2013 passed in A.S.No.34 of 2011 on the file of the Subordinate Judge, Kuzhithurai reversing the judgment and decree dated 14.12.2010 passed in O.S.No.527 of 2005 on the file of II Additional District Munsif Court, Kuzhithurai.)

1. Subanandaraj, S/o.Nallamuthu, the second defendant in the original suit is the appellant herein. Mani S/o.Muthunayagam, the plaintiff in the said suit is the sole respondent in the second appeal.

2. The respondent herein filed O.S.No.527 of 2005 in the Court of District Munsif, Kuzhithurai against one Nallamuthu, S/o.Late Gnanamony Nadar and Subanandaraj, S/o.Nallamuthu for declaration of his title over the plaint 'B' schedule property, for recovery of the plaint 'B' schedule property from the defendants therein, for recovery of future mesne profits at the rate of Rs.300/- per

annum from the date of plaint till recovery of possession and for costs. The suit was resisted by the defendants based on their common written statement. The first defendant Nallamuthu died and his son, who was already there on record as the second defendant, was recorded as the legal representative of his father Nallamuthu also. After trial, the learned trial Judge (II Additional District Munsif, Kuzhithurai), dismissed the suit without costs by a judgment and decree dated 14.12.2010. The plaintiff therein preferred an appeal before the Sub-Court, Kuzhithurai in A.S.No.34 of 2011. The learned lower appellate Judge (Subordinate Judge, Kuzhithurai), by a judgment and decree dated 28.01.2013 allowed the said appeal, set aside the decree of the trial Court dated 14.12.2010 and granted the relief of declaration and recovery of possession with cost. However, the learned lower appellate Judge disallowed the claim regarding mesne profits. As against the said judgment and decree of the lower appellate Court, the sole surviving defendant has preferred the second appeal.

3. The second appeal was admitted on 19.09.2013 noticing four questions to be the substantial questions of law involved in the second appeal. They are

1) Whether the judgment and decree of the lower appellate Court, applying the principle that boundaries will prevail over extent, is sustainable in law when the respondent has come forward with a specific case of survey number and extent?

2) Whether the judgment and decree of the lower appellate Court on Ex.B5 and Ex.B6 are sustainable when Ex.B5 was not questioned by the respondent/plaintiff?

3) Whether the suit is liable to be dismissed for not identifying the B Schedule property and the alleged trespass?

4) Whether the suit is bad for non-joinder of necessary parties?

4. The arguments advanced by Ms.J.Anandhavalli, learned counsel appearing on behalf of the appellant and Mr.S.Alagarsamy, learned counsel appearing on behalf of the respondent, were heard. The judgments of the Courts below and the materials available on record were also perused.

5. Admittedly 82 cents comprised in S.No.292/1 in Kulappuram village and Acres 2.18 comprised in R.S.No.293/10 of the same village (totally measuring 3 acres) jointly belonged to the deceased first defendant Nallamuthu and his brother Muthunayagam. The said Muthunayagam is the father of Mani, the respondent herein/plaintiff. It is also not in dispute that they orally divided the said properties and each one got an extent of Acres 1.50. The respondent herein/plaintiff claims that his father Muthunayagam was allotted a plot forming the extreme north-western portion and also another plot forming the eastern portion of the said property towards his share. To be more clear, it is the contention of the respondent/plaintiff, that his father was allotted the entire 88 cents comprised in R.S.No.292/1 forming the eastern portion of the combined land of 3 acres and another plot measuring 62 cents on the north-wester corner of R.S.No.293/10. It is his further contention that out of the eastern portion, namely 88 cents comprised in R.S.No.292/1 allotted to his father Muthunayagam, he settled on the respondent herein/plaintiff an extent of 48 cents by way of a gift settlement deed dated 05.06.1995, registered as Document No.1141 of 1995 and that while thus settling the same on the respondent herein/plaintiff, the said property measuring an extent of 48 cents came to be described as two plots, one measuring 11 cents with a old thatched house and the other measuring 37 cents in which there was no house. It is his further case that both the said plots of 11 cents with a thatched house and 37 cents without any house were contiguous plots and were comprised in a single Survey number namely, R.S.No.292/1 and no part of the said plot formed part of or comprised in R.S.No.293/10; that however, while executing the gift settlement deed, R.S.No.293/10 came to be mentioned along with R.S.No.292/1 as if the property fell under both the survey numbers and that the same was a mistake. It is the further case of the respondent/plaintiff that the said extent of 37 cents comprised in R.S.No.292/1 shown as second item in the settlement deed was fenced by the respondent /plaintiff on its western and northern boundaries by barbed wire fence; that there was an old demarcating bund with various kinds of trees on the eastern boundary of the said plot and that since the respondent /plaintiff, was absent from the said village due to his employment, the defendants 1 and 2 removed the barbed wire fence put up on the western boundary of the 37 cents of land shown as item 2 of plaint 'A' schedule, shifted the boundary to further

east and trespassed into and annexed 8 cents of land with their property, thereby forcing the respondent herein/plaintiff to file the above said suit for declaration of title, recovery of possession of the encroached portion shown as plaint 'B' schedule property and for mesne profits.

6. On the other hand, the contention of the defendants before the trial Court was that the two plots measuring 11 cents and 37 cents settled on the respondent herein/plaintiff by his father Muthunayagam under the settlement deed dated 05.06.1995 were not adjacent or contiguous plots; that the contention made by the respondent herein/plaintiff that S.No.293/10 came to be included by mistake was not correct and that such contention was raised by the respondent herein/plaintiff to make a claim in respect of the portion allotted to the first defendant Nallamuthu, the father of the appellant herein/second defendant. It was the further contention of the defendants before the trial Court that Muthunayagam, the father of the respondent herein/plaintiff was allotted 82 cents forming the north-western portion of R.S.No.293/10 and 68 cents forming the eastern portion of R.S.No.292/1; that 20 cents forming the north-western portion of R.S.No.292/1 and Acres 1.30 forming the eastern portion of S.No.293/10, both together forming a single plot measuring Acres 1.50, came to be allotted to Nallamuthu, the deceased first defendant; that after such partition, the portions allotted to Muthunayagam were subdivided into 293/10A and 292/1A whereas the portions allotted to Nallamuthu, the first defendant came to be assigned Sub-division numbers 293/10B and 292/1B respectively. It was the further contention of the defendants that out of 1.30 acres allotted to him in S.No.293/10, the first defendant Nallamuthu, settled an extent of 52 cents forming the northern part of the said 1.30 acres in favour of the appellant herein/second defendant and also settled the entire share of 20 cents he got in R.S.No.292/1 on the appellant herein/first defendant under two settlement deeds dated 27.10.2005 and 05.01.2006 respectively. It was their further contention that the remaining extent of 77 in S.No.293/10 was settled by the first defendant in favour of his another son Dayanandraj under a settlement deed dated 05.01.2006 and that the said portion thus settled on Dayanandraj came to be assigned a separate Sub-Division number with R.S.No.293/10C whereas 52 cents forming the northern part of the said plot settled in favour of the second defendant came to be subdivided and assigned S.No.293/10B; that the entire extent of 20

cents allotted to the first defendant in S.No.292/1 and settled by him on the second defendant, which was assigned R.S.No.292/1B and that 52 in R.S.No.293/10 and 20 cents of land in R.S.No.292/1 settled on the 2nd defendant formed a single plot and it came to be exclusively possessed by the appellant herein/second defendant. The alleged shifting of the boundary by removing fence and trespass into the plaint 'B' schedule property was also claimed to be false and imaginary.

7. There is no dispute between the parties regarding the fact that the deceased first defendant Nallamuthu and Muthunayagam, the father of the plaintiff were brothers and they were the joint owners of the properties comprised in S.No.293/10 having an extent of 2.18 acres and S.No.292/1 having an extent of 82 cents. It is also not in dispute that the entire 3 acres of land comprised in both the survey numbers came to be divided orally between the deceased first defendant Nallamuthu and his brother Mathunayagam equally and each one of them got 1.50 acres in the said partition. It is also an admitted fact that S.No.293/10 was on the west and S.No.292/1 was immediately on the east. According to the case of the plaintiff, the extreme north-western portion measuring 62 cents comprised in S.No.293/10 was allotted to the deceased first defendant Muthunayagam in the oral partition, whereas the entire southern portion and the north eastern portion and also the portion south of the 62 cents allotted to Muthunayagam in the very same survey number came to be allotted to the deceased first defendant towards his share.

8. It is not in dispute that 2.18 acres comprised in S.No.293/10 lies on the west and 88 cents comprised in S.No.292/1 lies on the east and both the survey numbers are adjacent making the entire extent of 3 acres a single plot. According to the respondent/plaintiff, while dividing the same, the entire extent of 88 cents comprised in R.S.No.292/1 which formed the eastern part of the total extent of 3 acres owned by the brothers was allotted to Muthunayagam, the father of the respondent herein/plaintiff and for the balance extent to which he was entitled, he was allotted the extreme north-western portion of S.No.293/10 measuring 62 cents. So far as the allotment of the extreme north western portion of S.No.293/10 measuring 62 cents to Muthunayagam, the father of the respondent/plaintiff is concerned, the defendants have not chosen to raise any dispute. On the other

hand, what they have contended is that the entire extent of 88 cents in S.No.292/1 was not allotted to Muthunayagam and on the other hand, 22 cents of land forming the north-eastern portion of S.No.292/1 alone was allotted to Muthunayagam for his share. The claim made by the defendants in Paragraph 5 of the written statement is that the north-western portion of R.S.No.293/10 measuring 82 cents and the eastern portion of R.S.No.292/1 measuring 68 cents, both making together an extent of 1.50 acres were allotted to Muthunayagam in the partition. The further contention of the defendants is that the remaining 1.30 acres in R.S.No.293/10 forming the eastern part of the said survey number and 20 cents forming the north-western part of S.No.292/1 (together accounting for an extent of 1.50 acres) were allotted to the first defendant as a single plot.

9. The said contention seems to be one raised out of confusion because of a mistake found in the settlement deed executed by Muthunayagam in favour of the respondent/plaintiff and mutation of revenue records by wrongly issuing patta in respect of 20 cents forming north-western portion of S.No.292/1 in the name of the second defendant assigning a Sub-Division No.292/1B. The deceased first defendant Nallamuthu settled an extent of 52 cents forming part of S.No.293/10B to his son, namely the appellant herein/second defendant under a registered settlement deed dated 17.06.1998 registered as Document No.1101 of 1998 on the file of Sub-Registrar, Kollenkode. A certified copy of the said settlement deed has been marked as Ex.B1. From the said document, it is quite obvious that 52 cents with specific measurements forming the north eastern portion of S.No.293/10 came to be settled by Nallamuthu on his son Subanandaraj, the respondent herein/second defendant. While describing the boundaries of the said property, the northern boundary is shown as Road, the southern boundary is shown as the property belonging to the settlor, the western boundary is shown as the property of Muthunayagam and the eastern boundary is shown as R.S.No.292/1 belonging to the settlor Nallamuthu. A reading of the said document may give an impression that a portion of S.No.292/1 adjoining the north eastern portion of S.No.293/10 settled on the second defendant belonged to the first defendant Nallamuthu. The said document contains a recital as if the property was his self-acquisition, having purchased the same in his name. The relevant recital found in Ex.B1 in vernacular is extracted hereunder:

(Tamil)

It proceeds on the basis that the property had been purchased by Nallamuthu. But the particulars of the sale deed under which he purchased the same had not been furnished in Ex.B1. The claim of self-acquisition is admittedly wrong. The same is the reason why the first defendant Nallamuthu executed a rectification deed dated 13.11.1999 registered as Document No.2336 of 1999. The same is Ex.B2. In the said Rectification Deed, it has been clarified that the tracing of title as if it had been purchased by the settlor was wrong and on the other hand it had come to him through his ancestors. The relevant portion of the Rectification Deed in vernacular is extracted herein:

(Tamil)

10. Another settlement deed dated 27.10.2005 executed by the deceased first defendant Nallamuthu in favour of his son Subanandaraj, the appellant herein/second defendant, which was registered as Document No.2664 of 2005 on the file of the Sub-Registrar, Kollenkode, has been produced as Ex.B5. The property sought to be settled under Ex.B5 was described as 16 cents of vacant house site forming the north western part of R.S.No.292/1. Its boundaries have been noted as road on the north, house site (g[uaplk;) belonging to Mani (the respondent herein/plaintiff), on the east, the land belonging to Nallamuthu on the south and the land belonging to the appellant/second defendant on the west. Ex.B6 is the registered settlement deed dated 05.01.2006 executed by the first defendant Nallamuthu in favour of his son, namely the appellant herein/second defendant Subanandaraj, in respect of 4 cents of land in S.No.292/1 with the following boundaries:

On the North Road;

South The property of Nesamani;

East The property of Mani, the respondent herein/plaintiff ;

West the property of the Settlee Dayanandraj, the appellant/second defendant

The said document has been registered as Document No.41/2006 on the file Sub-Registrar, Kollenkode. A perusal of the description of the said property will show that an attempt was made to settle 4 cents of land which lies on the east of the property dealt with under Ex.B5 to cover the entire 20 cents regarding which patta came to be issued by the revenue authorities in favour of the deceased first defendant Nallamuthu. It seems, the revenue authorities chose to subdivide S.No.292/1 into S.No.292/1A and S.No.292/1B and patta came to be issued for S.No.292/1B in favour of Nallamuthu, the deceased first defendant. Muthunayagam, the father of the plaintiff, executed a settlement deed on 05.06.1995, registered as Document No.1141/1995 on the file of the Sub-Registrar, Kollenkode under the said settlement deed, several items were sought to be settled on the respondent/plaintiff. 6 cents in S.No.293/10, 5 cents in S.No.292/1, 20 cents in S.No.293/10, 17 cents in S.No.292/1 were among the properties sought to be settled. According to the respondent/plaintiff, 6 cents and 20 cents said to be comprised in S.No.293/10 were actually comprised in S.No.292/1 and by mistake, S.No.293/10 came to be mentioned as the survey number in which the said extents were comprised. It is the case of the respondent/plaintiff that, taking advantage of the said mistake and the fact that a subdivision came to be effected because of the mistaken description of the property relating to survey number, the defendants wanted to take advantage and stake claim to a portion of the second item of the plaint 'A' schedule properties measuring 20 cents of land; that in execution of their intention, settlement deed dated 17.06.1998 and Rectification Deed dated 13.11.1999, certified copies of which have been marked as Exs.B1 and B2 and Exs.B6 and B7 - settlement deeds dated 27.10.2005 and 05.01.2006 came to be executed; that thereafter the defendants also encroached upon a portion of the second item of the plaint 'A' schedule properties measuring 8 cents shown as plaint 'B' schedule property and that hence, the respondent/plaintiff was constrained to approach the Court seeking declaration of his title in respect of the plaint 'B' schedule property, for recovery of the same from the defendants and for mesne profits.

11. The following circumstances under which the dispute has arisen shall be taken note of:

Admittedly, Old S.No.2776 and 2780 were contiguous properties. They were assigned R.S.Nos.293/10 and 292/1 respectively in the UDR survey. It is not in dispute that R.S.No.293/10 lies on the west and R.S.No.292/1 lies on the east abutting R.S.No.293/10. It is also an admitted fact that the extent of R.S.No.293/10 is acres 2.18 and the extent of R.S.No.292/1 is Acres 0.88 and that the total extent of 3 acres comprised in those two survey numbers formed a single plot. The deceased first defendant Nallamuthu and Muthunayagam, the father of the plaintiff, were sons of one Gnanamani Nadar, who owned the entire property of three acres. On the death of Gnanamani Nadar, his sons Muthunayagam and Nallamuthu became co-owners of the said property by way of succession to the estate of Gnanamani Nadar. They effected a division of the said property orally, several years prior to the filing of the suit and the division was equal in terms of extent. Muthunayagam got Acres 1.50 and his brother Nallamuthu got an equal extent (Acres 1.50). The above said facts are admitted and not disputed. However, there is a dispute regarding the areas allotted to Muthunayagam in the respective survey numbers. According to the plaintiff, the entire extent of 88 cents comprised in R.S.No.292/1 was allotted to the share of his father Muthunayagam and the balance 62 cents was allotted to him in north-western corner of R.S.No.293/10. According to him, the north-western plot allotted to Muthunayagam in R.S.No.293/10 measured 62 cents alone and hence, the entire extent of 88 cents comprised in R.S.No.292/1 was allotted to Muthunayagam. On the other hand, it is the contention of the defendants that Muthunayagam was allotted a plot of 82 cents forming the north-western corner of R.S.No.293 /10 and that hence an extent of 68 cents alone was allotted to him in R.S.No.292/1 and the same formed the southern and north east portions of R.S.No.292/1, whereas 20 cents forming the north western portion of S.No.292/1 was allotted to the deceased first defendant Nallamuthu.

12. A resolution to the question, "which of the rival claims as to the area allotted to Muthunayagam in each one of the survey numbers is correct?" - shall provide a solution to the entire dispute. Till Muthunayagam chose to execute a gift settlement deed on 05.06.1995 in favour of his son Mani, the plaintiff in the suit, there was no problem. The said gift settlement deed executed by Muthunayagam on 05.06.1995 in favour of Mani (the plaintiff) has been marked as Ex.A1. It has

been executed in respect of two items as shown in plaint 'A' schedule. The first item is 11 cents of house site with a house therein. The defendants did not dispute the fact that the plaintiff derived a valid title under Ex.A1 in respect of the first item having an extent of 11 cents along with a residential house therein, shown as the first item in plaint 'A' schedule. The second item under Ex.A1 has been stated to be 37 cents of land. Its western boundary is shown as the property of the defendants, northern boundary is shown as road, eastern boundary is shown as the property of one Samuel and the southern boundary is given as the properties belong to Saleem Kumar and the property of the Settlor Muthunayagam. There is no dispute regarding the correctness of the boundaries on three sides, namely north, east and south. However, the defendants disputed the southern boundary provided in Ex.A1. It was also contended by them that the 11 cents of land with the house shown as the first item and 37 cents of land shown as the second item were not contiguous sites.

13. In this regard, a consideration of the northern boundary of the first item (11 cents house site with house) and the southern boundary of the second item (37 cents plot) found in Ex.A1 will help the Court to decide whether both the plots are contiguous or not. The northern boundary of the first item has been shown to be land belonging to the settlor and the southern boundary of the second item has been shown to be the land belonging to the settlor and also the land belonging to Saleem Kumar. The same will make it clear that the two items settled on the plaintiff by Muthunayagam under Ex.A1 are contiguous plots touching each other. 11 cents of house site with house, namely the first item, lies on the south and 37 cents of land, namely the second item, lies on the north. Besides making a clear plea that both the plots are contiguous, the plaintiff has also let in sufficient oral and documentary evidence in proof of the same. Especially the recital found in Ex.A1 shall be enough to substantiate the contention of the plaintiff that both the plots settled thereunder are contiguous.

14. Per contra, the second defendant, while deposing as DW1, unsuccessfully made an attempt to contend that items 1 and 2 found in Ex.A1 settlement are not contiguous. He also made an attempt to contend that though the second item under Ex.A1 had been shown to be an extent of 37 cents, an extent of 22 cents

alone was available. However, during cross-examination, DW1 himself clearly admitted that Muthunayagam settled a total extent of 48 cents under Ex.A1 on the plaintiff. The relevant portion of his testimony in vernacular is extracted hereunder:

(Tamil)

DW1 made an attempt to project a new case, not pleaded either in the written statement or in his chief examination, that the second item of 37 cents shown in Ex.A1 itself was in two separate plots. The relevant portion in his testimony in the cross examination in vernacular reads as follows:

(Tamil)

Even though DW1 would have stated that the second item of 37 cents shown in Ex.A1 is in two separate plots and that only an extent of 22 cents is available on the east DW1's property, he has failed to state where lies the balance extent of 15 cents. Even then DW1 stated that he had no objection regarding the total extent of 48 cents settled on the plaintiff under Ex.A1.

15. It is the contention of the plaintiff that his father Muthunayagam was allotted an extent of 62 cents on the north- western corner of R.S.No.293/10. The defendants did not dispute the fact that in the admitted oral partition, Muthunayagam, the father of the plaintiff, got a plot on the north-western corner of R.S.No.293 /10. But the defendants had chosen to take a plea that the plot allotted to Muthunayagam in the north-western corner of R.S.No.293/10 did have an extent of 82 cents. However, during the course of trial, the second defendant, who deposed as DW1, candidly admitted that the plaintiff's father was given 62 cents on the north-western corner of the entire 3 acres of land. If at all 62 cents on the north-western corner was allotted to the father of the plaintiff, then the entire extent of 88 cents comprised in R.S.No.292/1 should have been allotted to him to make his share account for Acres 1.50. A plea contrary to the one taken in the written was sought to be projected during trial as if a plot of 82 cents in the north-western corner of R.S.No.293/10 and a plot of 68 cents on the eastern part of R.S.No.292/1 and another plot of 20 cents somewhere else in R.S.No.293/10 came to be allotted to Muthunayagam, the father of the plaintiff. It is not the testimony of DW1 or DW2

that the 20 cents of plot lies somewhere else in R.S.No.293/10. They were not able to show the location of the said 20 cents of land.

16. On the other hand, it is quite obvious that 25 cents of land forming the western portion (to be precise, south-western portion) of R.S.No.292/1 was settled by Muthunayagam under the original of Ex.A8 gift settlement deed in favour of Nesamani, another son of Muthunayagam; that 15 cents of land forming the south-eastern part of R.S.No.292/1 was settled by Muthunayagam on his other son Franklin under the original of Ex.A9. 11 cents of land (the first item of plaint 'A' schedule) forming the middle portion extending up to the eastern boundary was settled on the plaintiff under Ex.A1 and the balance extent of 37 cents forming the northern portion of R.S.No.292/1 was also settled on the plaintiff under Ex.A1. DW1, who does not dispute the validity of the settlement made under the originals of Exs.A8 and A9 and also the settlement made under Ex.A1 in respect of the 11 cents of house site with house shown as the first item, has made an attempt to contend that the second item contains only an extent of 22 cents in R.S.No.292/1. The said stand seems to have been taken because of the mistake that crept in while executing Ex.A1 settlement deed. Ex.A1 was executed on 05.06.1995. Re-survey numbers have been provided in Ex.A1 for the first item (11 cents) on an erroneous assumption that it was comprised in both R.S.No.293/10 and 292/1 (6 cents in R.S.No.293/10 and 5 cents in R.S.No.292/1). Similarly, both R.S.Nos.293/10 and 292/1 (20 cents and 17 cents respectively) have been quoted as the survey numbers in which the second item was comprised. However, the defendants have clearly admitted that the first item is comprised solely in R.S.No.292/1. So far as the second item is concerned, it has been stated in clear terms in Ex.A1 that the said item measuring 37 cents forms a single plot (xd;whf fplg;g[) situated on the north-eastern corner of the entire land of 3.00 Acres. In case the defendants had got 20 cents on the north-western part of R.S.No.292/1, there will be a deficiency of 20 cents in the share of Muthunayagam. If we hold that 20 cents will be available somewhere else in R.S.No.293/10, it will amount to giving a different meaning to the recital found in Ex.A1, which is to the effect that the entire 37 cents of land is in a single plot (xnu fplg;g[)/

17. Furthermore, the contention of the defendants that the plot allotted to Muthunayagam on the north-western corner of the entire extent of 3 acres comprised in both the survey numbers accounted for 82 cents, has been given a go by and DW1 has clearly admitted that the father the plaintiff was allotted only 62 cents on the north-western corner. It is also obvious from Ex.A7 that out of 62 cents, the northern portion measuring 52 cents was settled by Muthunayagam on his son John Rose under the original of Ex.A7, retaining with him the southern portion measuring 10 cents. The second defendant, while deposing as DW1, has also admitted the said fact. The relevant portion in his testimony in vernacular is extracted hereunder:

(Tamil)

From the deposition of DW1 extracted above, it is quite obvious that there is no plot available to Muthunayagam on the south of the property retained by him at the time of execution of the original of Ex.A7 in favour of his son John Rose. It is also obvious that there is no space in between the north-western plot of Muthunayagam and the property of the defendants on the east of it, so as to enable the defendant to contend that 20 cents of land would be available in between the north-western plot of 62 cents and the north-eastern portion of R.S.No.293/10 allotted the deceased first defendant in the oral partition.

18. Admittedly, the first defendant was the Village Administrative Officer of Medhugumbal Revenue Village from which Kulappuram Revenue Village was separated subsequently. DW1 has admitted that his father Nallamuthu was the Village Administrative Officer of Medhugumbal Revenue Village before Kulappuram Village was carved out of it and that after the creation of Kulappuram Revenue Village, he functioned as the Village Administrative Officer of Kulapuram. The first defendant Nallamuthu executed Ex.B1 settlement deed dated 17.06.1998 gifting 52 cents of land forming the northern part of the land allotted to him in R.S.No.293/10, to his son, the second defendant. While providing boundaries to the said land, northern and southern boundaries were given correctly, but the western boundary was wrongly given as property of Nesamani and John Rose, whereas it should have been shown as the properties of John Rose and

Muthunayagam as admitted by DW1. Again the eastern boundary was wrongly provided as the property of the settlor under Ex.B1, namely the first defendant Nallamuthu, comprised in R.S.No.292/1. The property shown as the eastern boundary has not been described with its extent. It is pertinent to note that the first defendant Nallamuthu described the property settled under Ex.B1 on the second defendant to be his self-acquisition acquired by way of purchase and the same necessitated the execution of a Rectification Deed under Ex.B2 to correct the recital regarding the tracing of title and show that the settlor under Ex.B1 had got the same by way of succession from his ancestor. Again on 27.10.2005, the first defendant Nallamuthu executed another settlement deed under Ex.B5 purporting to settle 16 cents of land on the east of the property already settled under Ex.B1. The boundaries for the said 16 cents of land have been provided as follows:

North: Road;

East : Property of Plaintiff;

South: Property of the Settlor; and

West: Property of the Settlee.

The boundaries provided in vernacular are as follows:

(Tamil)

The property of the plaintiff is shown to be the eastern boundary. Therefore, there cannot be any scope for claiming even an inch beyond the property sought to be settled under Ex.B5 to be belonging to the settlor Nallamuthu. Not content with the execution of Ex.B5 settlement, again the first defendant Nallamuthu executed Ex.B6 settlement deed on 05.01.2006, purporting to settle 4 cents on the east of the property claimed to have been settled under Ex.B5. The boundaries to such 4 cents have been provided as under:

North: Property retained by the settlor

South: Property of Nesamani

East : Property of the plaintiff and

West: Property of the settlee

The boundaries provided therein in vernacular are given hereunder:

(Tamil)

19. When property lying on the west of the property of the plaintiff had already been settled under Ex.B5, the first defendant Nallamuthu could not have got any extent in between the said property and the property of plaintiff to be settled under Ex.B6. It is also quite obvious from a perusal of the plaint plan and also the FMBs produced as Ex.B9 and B10 that the southern boundary of Exs.B5 and B6 cannot be that of Nesamani and on the other hand, the southern boundary is none other than the first item of the plaint 'A' schedule properties measuring 11 cents. The defendants, by providing wrong boundaries, made an attempt to trouble the water and fish out of the same. A comparative study of Exs.B9 and B10 field maps relating to R.S.No.293 and R.S.No.292 and the plaint plan, will make it clear that a mistake was committed in Resurvey by divding R.S.No.292/1 into 292/1A and 292/1B and that the said mistake was sought to be taken advantage of and capitalised by the defendants. The mistake in the resurvey was caused because of the mistake found in Ex.A1 settlement deed providing R.S.No.293/10 also as the relevant Resurvey number, whereas the entire property settled under Ex.A1 was comprised within R.S.No.292/1. The first defendant, who was the Village Administrative Officer, taking advantage of the said mistake found in Ex.A1 chose to create documents to make a claim in respect of the 20 cents of land forming the north-western portion of R.S.No.292/1. The same will be clearly demonstrated by providing a rough sketch annexed to this judgment showing the topography of S.Nos.293/10 and 292/1.

20. The case of the plaintiff is that the entire northern portion of R.S.No.292/1 measuring 37 cents was settled on him by his father Muthunayagam under Ex.A1 settlement deed and that he had put up barbed wire fence on the northern and western boundaries of the same. It is his further contention that the defendants, taking advantage of the mistake found in Ex.A1 settlement deed regarding survey

numbers and the mistake committed by the Resurvey Authorities, removed the barbed wire fence on the western boundary and to some extent on the northern boundary of the second item and encroached upon a portion roughly measuring 8 cents, which has been shown as the plaint 'B' schedule property. Complaining removal of the fence and encroachment, the plaintiff lodged a complaint with the police, based on which a case was registered in Kaliakavilai Police Station in Cr.No.627 of 2005 on 08.11.2005 for alleged offences under Sections 427 and 379 IPC. Of course it is true that the Investigating Officer, at the conclusion of investigation, submitted a negative final report on 18.11.2005 itself, closing the complaint as mistake of fact. The Investigating officer seems to have stated that on measuring the property with the help of Surveyor, besides examination of witnesses and from his discreet enquiry, he found that no article was missing and barbed wire fence was not removed. The final report was submitted on 18.11.2005 itself. From the contents of the final report it is seen that the Investigating Officer had not acted without bias. The same was the reason why the learned Judicial Magistrate, Kulithurai, by order dated 16.11.2006, rejected the negative final report and directed re-investigation and submission of a fresh final report. Such an order came to be passed on 16.11.2006. A copy of the order has been marked as Ex.A12. DW1 has not denied the fact that such an order came to be passed by the learned Judicial Magistrate, Kulithurai. On the other hand, he has simply pleaded absence of knowledge.

21. DW2 examined on behalf of the defendant to show that a portion lying on the east of the compound wall of the second defendant was enjoyed initially by the first defendant and it was settled on the second defendant, is not a reliable witness. He would say that the property lying on the east of the disputed property was in the possession and enjoyment of the Muthunayagam and after his death it is in the possession and enjoyment of the plaintiff and his brothers Nesamani, John Rose and Franklin. Admittedly, the property lying on the east of the disputed property was settled under Ex.A1 by Muthunayagam on the plaintiff long back in 1995 itself. The same has been admitted by the defendants and especially DW1, the second defendant. DW1 has stated that the extent of the said land is only 22 cents and not 37 cents. Even the said admitted fact is not known to DW2, as he has stated that the said property is in the possession of plaintiff and his three

brothers. The account projected by the defendants do not tally. The entire northern portion of R.S.No.292/1 admittedly measures 37 cents. If the property available to the plaintiff as per Ex.A1 settlement is only 22 cents, then the balance extent will account for 15 cents alone. However, the first defendant has claimed 20 cents forming the nort-western portion of R.S.No.292/1. Hence, the evidence of Dws 1 and 2 in this regard do not instill the confidence of the Court.

22. One Sundarajan examined as PW2 has clearly corroborated the case of the plaintiff. He has made it clear that, being a neighbour, he new the suit property. It is his clear testimony that the plaintiff had put up a barbed wire fence on the northern border and western border of his property and that the defendants removed the fence on 27.10.2005 and shifted the boundary by about 20 feets away from its original position. It is also his clear evidence that the area thus trespassed into and occupied by the defendants would measure about 7 to 9 cents. He has also given clear testimony to the effect that the standing trees worth Rs.5,000/- were cut and removed by the defendants. The mere fact that PW2 is employed at Coimbatore, cannot be the ground on which his evidence can be disbelieved, since admittedly he is a native of the suit village and he has got his residence near the suit property.

23. The above said discussions will make it clear that in Ex.A1-Settlement Deed, two adjoining properties measuring 11 cents and 37 cents respectively, with well defined boundaries and also extent, were gifted by Muthunayagam, the father of the plaintiff in favour of plaintiff. Particularly the second item measuring 37 cents was defined to be a single plot within specified boundaries. The only mistake committed while drafting Ex.A1-Agreement was to include S.No.293/10 also as one of the survey numbers in which the above said properties settled under Ex.A1 were comprised, whereas in fact the second item measuring 37 cents was comprised in S.No.292/1 alone. It is quite obvious from the fact that though the said 37 cents has been shown to be comprised in both the S.Nos.293/10 and 292/1, with the recital that the 20 cents fell within R.S.No.293/10 and 17 cents fell within R.S.No.292/1, it has been made clear that the entire 37 cents formed a single plot. The difficulty in correlating the old S.Nos.2776 and 2780 with the resurvey numbers led to the said mistake. There cannot be any plot belonging to

the defendants in between the 17 cents comprised in R.S.No.292/1 and 20 cents comprised in R.S.No.293/10, since the recitals are crystal clear that the entire extent of 37 cents formed a single plot. In view of the same, the mentioning of S.No.293/10 in the Settlement deed as one of the relevant survey numbers has to be disregarded, as nothing but a mistake. Under the said circumstances, the boundaries mentioned in the document and the extent mentioned in the document alone shall be material attracting the principle that the extent and boundaries coinciding with each other will prevail over the mistaken survey numbers. Accordingly, the first substantial question of law is answered against the appellant and in favour of the respondent.

24. Ex.B5 - Settlement Deed came to be executed by the first defendant Nallamuthu in favour of his son Subhanandaraj, the second defendant, on 27.10.2005 purporting to gift 16 cents of land comprised in R.S.No.292/1 on the east of the compound wall of the second defendant. The eastern boundary of the said 16 cents of land purported to be gifted to the second defendant was shown as the property of the plaintiff comprised in the same survey number. That being so, claiming a further extent of four cents on the east beyond the subject matter of Ex.B5, Ex.B6-Settlement Deed came to be executed on 05.01.2006. All the reasons stated above in the discussion regarding the first substantial question of law will make it clear that both the documents were created taking advantage of the mistake found in Ex.A1-Settlement Deed and also the mistake caused in the resurvey for sub-division of the relevant survey numbers. The first defendant, who was the Village Administrative Officer of the concerned village, chose to execute Exs.B5 and B6 documents to make an unethical claim in respect of a portion of the property of the plaintiff. The plaintiff has made it clear that the said documents were brought into existence with a view to make such unsustainable claim. Therefore, it cannot be assumed that the plaintiff had not questioned the validity of Ex.B5. The main contention of the plaintiff is that Exs.B5 and B6 came to be executed only for making a false claim. The plaintiff was not a party to the said documents and there shall be no question of challenging the documents seeking a declaration that they are invalid. Suffice to point out that those documents (Exs.B5 and B6) will not affect the right or title of the plaintiff. Hence the second substantial question of law is also answered accordingly against the appellant and in favour of

the respondent.

25. The third substantial question of law has been formulated on the assumption that the suit 'B' schedule property has not been identified. In fact by making a clear plea and by adducing clear evidence, the plaintiff has proved his case that the entire 88 cents comprised in R.S.No.292/1 fell to the share of his father Muthunayagam and out of the same, the middle portion measuring 11 cents and the northern portion measuring 37 cents came to him under Ex.A1-settlement deed. The plaintiff has also clearly proved that the property extends up to the western boundary of S.No.292/1, which is the eastern boundary of S.No.293/10. In addition, he has also made a clear plea and proved through his evidence as PW1 and the evidence of another witness (PW2) that he had put up a barbed wire fence on the northern and southern boundaries of second item of suit property, namely 37 cents; that the defendants removed the western fence and also the northern fence to some extent and shifted the boundary about 20' towards east and that thereby the defendant trespassed into and occupied a portion of roughly about 8 cents on the western border of S.No.292/1. The said encroached portion has been shown as the plaint 'B' schedule property. When such a clear averment has been made and clear evidence has been adduced to prove it, it cannot be contended that the plaint 'B' schedule property has not been identified and it has not been proved to be the area trespassed and occupied by the defendants. However, Since a plea was taken by the appellant in the second appeal that the respondent/plaintiff did not take steps to have the property identified by seeking appointment of an Advocate-Commissioner, the respondent herein/plaintiff filed a miscellaneous petition in M.P.No.2/2013 in the second appeal and this court, by an order dated 19.09.2013, allowed the said miscellaneous petition and appointed one Mr.L.Palato Aristotle, an Advocate practising in the Madurai Bench of the Madras High Court, having his office at Law Chamber 108, as Advocate-Commissioner to measure the properties with the assistance of Taluk Surveyor. Memo of instructions were given by the counsel for both parties and they have also provided the Commissioner with copies of relevant documents. Accordingly, the learned Advocate-Commissioner, with the assistance of the Sub Inspector of Survey, Vilavancode Taluk, measured the land and submitted a report and plan. The report and plan submitted by the Advocate-Commissioner shows that both the

parties have lost five cents on the south and north of S.Nos.293/10 and 292/1 which caused a reduction of the shares of Muthunayagam and his brother Nallamuthu to Acres 1.45 each as against 1.50. The report and plan shows that the 37 cents formed a single plot. The Commissioner has also marked the encroached portion in his plan. The Commissioner's report shows that the suit schedule 2nd item is a single plot of 37 cents and a portion on its western part has been encroached upon by the defendants. In addition the plaintiff has also adduced reliable evidence and proved that the entire 37 cents was comprised in R.S.No.292/1 alone and it formed a single plot. The encroached portion is shown as 'ABCD' in the plan annexed to this judgment. As the plaintiff has proved his case with reference to the boundaries of old survey number and also the extent of trespass, the third substantial question of law deserves to be answered in favour of the respondent and against the appellant.

26. A bald averment in the written statement has been made to the effect that plaintiff's brothers Nesamani, John Rose and Franklin M.Rousewelt were also interested in the suit properties and that they were necessary parties. It is a clear case of the plaintiff that the northern portion of S.No.292/1 measuring 37 cents had been settled on him by his father regarding which none of his brothers did have any claim. That being so, there shall be no question of holding that the brothers of plaintiff are necessary parties to the suit. Therefore, the fourth substantial question of law is answered against the appellant and in favour of the respondent holding that the suit has not been proved to be bad for non-joinder of necessary parties.

27. The learned trial Judge, without properly appreciating the evidence, rendered an erroneous and perverse finding against the plaintiff, which resulted in the pronouncement of a judgment and passing a decree against the plaintiff. The learned lower appellate Judge, on proper re-appreciation of evidence, has arrived at a correct conclusion that the plaintiff is entitled to a declaration of title in respect of the plaint 'B' schedule property and also a direction for recovery of the plaint 'B' schedule property. However, the learned lower appellate Judge has chosen to negative the prayer for mesne profits. Against the same, the plaintiff has not filed any appeal or cross-objection. So far as the prayer for declaration and recovery of

possession of plaint 'B' schedule property is concerned, the finding of the lower appellate Court, being the final Court of appeal on facts, cannot be said to be either defective or infirm, much less perverse warranting interference by this Court in the second appeal.

Accordingly, the second appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.