

**RSA No. 198 of 2010
C/W RSA No. 337 of 2010
RSA No. 339 of 2010**

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF JUNE, 2026

BEFORE

THE HON'BLE MR. JUSTICE V SRISHANANDA

REGULAR SECOND APPEAL No.198 OF 2010 (DEC/INJ)

C/W REGULAR SECOND APPEAL No.337 OF 2010

REGULAR SECOND APPEAL No.339 OF 2010

IN RSA No.198/2010

BETWEEN:

1. SRI M A RAJIAH
S/O PUTTASWAMIAH,
AGED ABOUT 60 YEARS
2. SMT. BASAMMA
W/O M.A. RAJIAH
AGED ABOUT 58 YEARS

BOTH ARE RESIDENT OF NO.1725,
SRI RAMA TEMPLE ROAD,
KOTE, HOLENARASIPURA TOWN
HASSAN DISTRICT – 573 201

...APPELLANTS

(BY SRI D.R.RAVISHANKAR, SENIOR ADVOCATE FOR
SRI SARAVANA, ADVOCATE)



AND:

1. SRI VISHNUPADACHAR
S/O SRI SARAPALLI SRINIVASACHAR
AGED ABOUT 65 YEARS,

AS PER COURT ORDER DATED 31.03.2021
THE RESPONDENT'S NAME IS DELETED AND
IN HIS PLACE HIS LRS NAMES ADDED;

- 1(a) SMT.VEENA ACHAR

W/O LATE VISHNUPADACHAR
AGED ABOUT 62 YEARS

1(b) SMT.SINDU ACHAR
D/O LATE VISHNUPADACHAR
AGED ABOUT 31 YEARS
R/A D.NO.150/B,
POORNA PRAGNA APARTMENTS
UTTARAHALLI,
BANGALORE – 560 062

1(c) SRI SHREYAS ACHAR
S/O LATE VISHNUPADACHAR
AGED ABOUT 29 YEARS

LRs No.1(a) AND 1(c) ARE
R/AT FORT MAIN ROAD
HOLENARASIPURA
HASSAN DISTRICT – 560 062

...RESPONDENTS

[BY SRI SRINIVASA RAGHAVAN.V, SENIOR ADVOCATE FOR
SRI ABHINAY.V, ADVOCATES FOR RESPONDENT NOS.1(a to c)]

THIS RSA IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE, AGAINST THE JUDGMENT AND DECREE DATED 19.12.2009 PASSED IN R.A.NO.32/2007 ON THE FILE OF THE PRESIDING OFFICER AND ADDL. DISTRICT JUDGE, FAST TRACK COURT, HOLENARASIPURA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 24.2.2007 PASSED IN O.S.NO.92/1995 ON THE FILE OF THE CIVIL JUDGE (SR.DN) HOLENARASIPURA. TRIAL COURT DISMISSED THE SUIT, APPELLATE COURT ALLOWED THE APPEAL. THE SUIT FOR DECLARATION AND MANDATORY INJUNCTION.

IN RSA NO. 337/2010

BETWEEN:

1. VISHNUPADACHAR
S/O SAREPALLY SRINIVASACHAR

SINCE DECEASED
REPRESENTED BY LEGAL REPRESENTATIVES

- 1(a) SMT.VEENA ACHAR
W/O LATE VISHNUPADACHAR
AGED ABOUT 62 YEARS
- 1(b) SMT.SINDU ACHAR
D/O LATE VISHNUPADACHAR
AGED ABOUT 31 YEARS
R/A D.NO.150/B,
POORNA PRAGNA APARTMENTS
UTTARAHALLI,
BANGALORE – 560 062
- 1(c) SRI SHREYAS ACHAR
S/O LATE VISHNUPADACHAR
AGED ABOUT 29 YEARS

LRs No.1(a) AND 1(c) ARE
R/AT FORT MAIN ROAD
HOLENARASIPURA
HASSAN DISTRICT – 560 062

...APPELLANTS

[BY SRI. SRINIVASA RAGHAVAN.V, SENIOR ADVOCATE FOR
SRI ABHINAY.V, ADVOCATE FOR APPELLANT NOS.1(a to c)]

AND:

1. M A RAJIAH
S/O PUTTASWAMIAH
AGED ABOUT 60 YEARS
2. SMT BASAMMA
W/O M A RAJIAH
AGED ABOUT 58 YEARS

BOTH ARE RESIDENTS OF
R/AT SRIRAMA TEMPLE STREET,
KOTE (FORT),
HOLENARASIPUR TOWN

HOLENARASIPURA -11

...RESPONDENTS

(BY SRI. R P SOMASHEKARAIHAH, ADVOCATE FOR C/R;
SRI D.R.RAVISHANKAR, SENIOR ADVOCATE FOR
SRI S.SARAVANA, ADVOCATE)

THIS RSA IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE, AGAINST THE JUDGMENT & DECREE DATED 19.12.2009 PASSED IN R.A.NO.26/2002 ON THE FILE THE ADDL. DISTRICT JUDGE, PRESIDING OFFICER, FAST TRACK COURT-III, HOLENARASIPURA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 15.2.2002 PASSED IN O.S.NO.15/1996 ON THE FILE OF THE CIVIL JUDGE (JR.DN), HOLENARASIPURA.

IN RSA NO. 339/2010

BETWEEN:

1. SRI VISHNUPADACHAR
AGED ABOUT 62 YEARS
S/O SAREPALLY SRINIVASACHAR
SRIRAMA TEMPLE STREETKOTE(FORT),
HOLENARASIPUR TOWN
HOLENARASIPUR
- 1(a) SMT.VEENA ACHAR
W/O LATE VISHNUPADACHAR
AGED ABOUT 62 YEARS
- 1(b) SMT.SINDU ACHAR
D/O LATE VISHNUPADACHAR
AGED ABOUT 31 YEARS
R/A D.NO.150/B,
POORNA PRAGNA APARTMENTS
UTTARAHALLI,
BANGALORE – 560 062
- 1(c) SRI SHREYAS ACHAR
S/O LATE VISHNUPADACHAR
AGED ABOUT 29 YEARS

RSA No. 198 of 2010
C/W RSA No. 337 of 2010
RSA No. 339 of 2010

LRs No.1(a) AND 1(c) ARE
R/AT FORT MAIN ROAD
HOLENARASIPURA
HASSAN DISTRICT - 560 062

...APPELLANTS

[BY SRI. SRINIVASA RAGHAVAN.V, SENIOR ADVOCATE FOR
SRI ABHINAY.V, ADVOCATE FOR APPELLANT NOS.1(a to c)]

AND:

1. M A RAJAIAH
S/O PUTTADASWAMAIAH
AGED ABOUT 60 YEARS
2. SMT BASAMMA
W/O M A RAJAIAH
AGED ABOUT 58 YEARS

BOTH ARE RESIDENTS OF
SRIRAMA TEMPLE STREET
KOTE (FORT), HOLENARASIPURA TOWN,
HOLENARASIPUR-11

...RESPONDENTS

(BY SRI. R P SOMASHEKARAIAH, ADVOCATE FOR C/R;

SRI D.R.RAVISHANKAR, SENIOR ADVOCATE FOR
SRI S.SARAVANA, ADVOCATE)

THIS RSA IS FILED UNDER SECTION 100 OF CODE OF
CIVIL PROCEDURE AGAINST THE JUDGMENT & DECREE
DATED 19.12.2009 PASSED IN R.A.NO.32/2007 ON THE FILE
THE ADDL. DISTRICT JUDGE, PRESIDING OFFICER, FAST
TRACK COURT-III, HOLENARASIPURA, ALLOWING THE
APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE
DATED 24.2.2007 PASSED IN O.S.NO.92/1995 ON THE FILE
OF THE CIVIL JUDGE (SR.DN) HOLENARASIPURA.

THESE APPEALS HAVING BEEN RESERVED FOR
JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY,
THE COURT PRONOUNCED THE FOLLOWING:-

CORAM: HON'BLE MR. JUSTICE V SRISHANANDA

CAV JUDGMENT

These three second appeals are inter connected to each other. In RSA No.198/2010 Sri M.A.Rajaiah is the appellant and in RSA No.337/2010 and RSA No.339/2010, Sri S.Vishnupadachar is the appellant.

2. For ready reference, Original Suit number, Regular Appeal number, the status of the parties is tabulated hereunder:

Plaintiff	O.S.No.	R.A.No.	RSA No.	Appellant
M.A.Rajaiah	92/1995	32/2007	198/2010	M.A.Rajaiah
M.A.Rajaiah	15/1996	26/2002	337/2010	Vishnupadachar
M.A.Rajaiah	92/1995	32/2007	339/2010	Vishnupadachar

3. For the sake of convenience, parties are referred to as per their ranking before the Trial Court as plaintiff and defendant.

4. While admitting RSA Nos.337/2010 and 339/2010, a co-ordinate Bench of this Court, by the Order dated 11.02.2010, framed the following substantial questions of law:

"(i) Whether the First Appellate Court was justified in proceeding to reconcile varying description of the suit schedule property in O.S.No.92/2015 and O.S.No. 15/1996, which was filed by the same plaintiff, in respect of the same suit schedule property?

"(ii) Whether the Lower Appellate Court was justified in declaring the ownership of the respondent in respect of a Oni, which was declared by this Court in its writ jurisdiction in W.A.Nos.4683 and 4685/2002 as being property of the Town Municipality of Holenarasipura?"

5. It is to be noted that in RSA No.198/2010, learned Judge has passed an order dated 08.07.2019 with regard to substantial questions of law as under:

"The common substantial questions of law raised in the connected RSA No.337/2010 and 339/2010 will also arise for consideration in this appeal."

6. At the time of hearing, this Court, having noticed the scope of the appeal and judgment under challenge, put it across to the respective advocates about 'substantial questions of law' for its relevancy and adequacy.

7. At that juncture, advocates appearing for the parties Sri D.R.Ravishankar, learned Senior Advocate for Sri M.A.Rajaiah and Sri Srinivasa Raghavan.V, learned Senior Advocate for Sri

S.Vishnupadachar filed necessary applications to re-frame the substantial questions of law.

8. As such, after hearing the parties and on perusal of the material on record, by the Order dated 17.04.2026 this Court framed the following substantial questions of law in each of these appeals.

"In R.S.A.No.198/2010:

Whether the First Appellate Court was justified in refusing the relief of mandatory injunction after decreeing the suit of the plaintiff by reversing the judgment of the Trial Court.

In R.S.A.No.339/2010:

Whether the First Appellate Court was justified in decreeing the suit of the plaintiff ignoring the finding recorded by the Court Commissioner that there was no encroachment on the municipal lane.

In R.S.A.No.337/2010:

Whether the First Appellate Court was justified in decreeing the suit of the plaintiff granting the mandatory injunction directing the defendant to close the windows in the first floor portion and removal of the sajja, which is constructed on the window."

9. Shorn of unnecessary details, the factual matrix for disposal of these three appeals are as under:

9.1 Sri M.A.Rajaiah, filed O.S.No.15/1996 with the following prayer:

"WHEREFORE, the plaintiffs pray that this Hon'ble Court be pleased to pass the judgment and decree against the defendant for:

a) DECLARATION: by declaring that the plaintiffs are the absolutely owners of the schedule property in which defendant has absolutely no right, title or interest whatsoever.

b) MANDATORY INJUNCTION: by ordering the defendant or otherwise through the Court process, to demolish the sajja constructed on the schedule property and remove the windows and close permanently at cost and expenses of the defendant.

c) POSSESSION: By ordering delivery of vacant possession of constructed sajja portion on the suit schedule property to the plaintiffs by the defendant.

d) PERMANANET INJUNCTION: restraining the defendant and/ or any other person or persons claiming under/or acting at the instances of the defendant perpetually from interfering with the plaintiffs' peaceful possession and enjoyment of suit schedule property."

9.2 Sri M.A.Rajaiah, had filed O.S.No.92/1995 with the following prayer:

"WHEREFORE, the plaintiffs pray that this Hon'ble Court be pleased to pass the judgment and decree against the defendant for:

- a) DECLARATION: by declaring that the plaintiffs are the absolute owner of the schedule property in which the defendant has absolutely no right, title or interest whatsoever.
- b) POSSESSION: By ordering delivery of vacant possession of the schedule property to the plaintiffs by the defendant.
- c) MANDATORY INJUNCTION: by ordering the defendant or otherwise through the Court process, to demolish the wall constructed on the schedule property, at the cost and expenses of the defendant.
- d) DAMAGES: by ordering the defendant to pay the sum of Rs.51,000/- (Rs. Fifty one thousand) towards the damages in tort for the wrongful loss caused by the defendant to the plaintiffs.
- e) PERMANENT INJUNCTION: restraining the defendant and/ or any other person or persons claiming under/or acting at the instance of the defendant perpetually from interfering with the plaintiffs' peaceful possession and enjoyment of suit schedule property.

9.3 Schedule mentioned in O.S.No.15/1996 is as under:

"Area measuring East to West 2 feet and North South 21 feet situated in Kote Ramadevara Temple street, Holenarasipura town assessment No.1850 bounded on:

East: The defendant's property purchased under the sale deed dated 24.9.79.

West: The plaintiffs property purchased under the sale deed dated 2.9.94.

North: Sadashivanna's property.

South: The plaintiffs' property purchased under the sale deed dated 2.9.94."

9.4 Schedule mentioned in O.S.No.92/1995 is as under:

"Space measuring East to West 2 feet and North South 40 feet situated in Kote Ramadevara Temple street, Holenarasipura town assessment No.1850 bounded on:

East: The defendant's property purchased under the sale deed dated 24.9.79.

West: The plaintiffs property purchased under the sale deed dated 2.9.94.

North: The space forming part of the plaintiffs' said property and.

South: Kote Ramadevara Temple Street."

10. After raising necessary issues and recording the evidence of the parties, on contest, both the suits were dismissed by the learned Trial Judge on 24.02.2007 and 15.02.2002, respectively.

11. Against the dismissal of the suits, plaintiff filed two appeals in R.A.No.32/2007 and R.A.No.26/2002 before the First Appellate Court.

12. Learned Judge in the First Appellate Court after hearing the parties, reversed the judgment of the Trial Court in both the cases and in R.A.No.32/2007, allowed the appeal and decreed the suit for declaration of title of plaintiff, but prayer for mandatory injunction of demolition of the wall was refused.

13. Likewise, R.A.No.26/2002 was also allowed and judgment passed by the learned Trial Judge in O.S.No.15/1996 dismissing the suit is reversed and decreed the suit as prayed for.

14. The material evidence placed on record can be summarized as under:

15. In O.S.No.92/1995, plaintiff-Rajaiah is examined as P.W.1 and on his behalf, two witnesses viz., Basamma and H.C. Viswanath are examined as P.W.2 and P.W.3 respectively.

16. The documentary evidence that were placed before the Trial Court comprised of 16 documents consisting of copy of sale deeds, letters, assessment copy, photos, negatives, khata

extract, endorsement/order copy, copy of the Order of the Deputy Commissioner, Hassan, Copy of the Order passed in W.P.Nos.24185/2002 c/w 14410/2002.

17. On behalf of the defendant, Vishnupadachar being the sole defendant, got examined himself as D.W.1. He placed on record nine documents which were exhibited and marked as Exs.D1 to D9 comprising of copy of the order passed in W.A.Nos.4683/2002 and 4685/2002, demand register copy, endorsement, copy of the judgment, decree, plaint, written statement and issues in O.S.No.15/1996.

18. A Court Commissioner was appointed for local inspection. Learned Trial Judge, after considering the memo of instructions filed by the parties, issued the commission warrant with a specific direction to carry out the local inspection on the following points:

"The Commissioner shall:

- 1) Issue 7 days notice to the plaintiff and defendant prior to his visiting the spots,*
- 2) measure the property of the plaintiff with reference to the sale deed dated 2.9.94 and note the properties situate within the boundaries,*

3) *measure the property of the defendant with reference to the sale deed dated 24.9.79.*

4) *locate if there is a lane/conservancy situate between the properties of the plaintiff and defendant and measure the width and length with reference to the town map,*

5) *note if the defendant had put up construction encroaching upon the plaintiffs' property and if so, state the extent of encroachment and the height of the construction on the encroached area,*

6) *In case there exists a lane or conservancy between the properties of the plaintiff and defendant as per town map, note if there is encroachment by the defendant on the lane/conservancy and if so, state measurement thereof,*

7) *Note if the construction being done by the defendant is in conformity with the approved plan obtained from the Town Planning Authority,*

8) *Prepare a neat sketch of the properties of the plaintiff and defendant including the lane/conservancy situate in between AND*

9) *submit report within 30 days from the date of receipt of commission warrant.*

19. The Commissioner by name Sri Krishnamurthy inspected the spot and he filed report along with sketch and approved

plan. Commissioner report is marked as Exhibit C-1, Sketch prepared by the Commissioner is marked as Exhibit C-2 and approved plans are marked as Exhibits C-3 to C-5.

EVIDENCE IN O.S.No.92/1995

20. In the affidavit filed in *lieu* of examination-in-chief on behalf of plaintiff/PW-1, it has been sworn to the effect that plaintiff purchased the suit property measuring East to West 49 feet and North to South 61 feet for valuable consideration from N.G. Ramakrishna Iyengar through a registered sale deed dated 02.09.1994; eastern portion of the main building was let out to a tenant by name T.N.Ramamurthy and he has provided the facility of bathroom measuring East-West $4\frac{3}{4}$ feet and North-South 5 feet constructed on the northern end.

21. It is further deposed that access to said bathroom was from the lane which is situated further north to the said bathroom; there was a lane all along 61 feet from North to South bordering the property on the eastern side.

22. PW-1 further deposed that, defendant purchased the property in the year 1979 which is situated on the eastern side of the property of the plaintiff measuring East to West 18 feet

and North to South 116 feet; with a old house. When the defendant purchased the property measuring 18 feet x 40 feet. In the year 1995 defendant obtained license to construct a new house measuring 20 feet x 40 feet by encroaching into plaintiffs' property. Therefore, suit in O.S No.92/1995 was filed.

23. It is further deposed that there was a wall all along 61 feet North-South direction bordering the property of the plaintiff on the eastern side.

24. He further deposed that defendant has no manner of right, title or interest in respect of the property purchased by the plaintiff including the lane measuring $4\frac{3}{4}$ feet x 27 feet and the wall bordering the said lane.

25. It is also deposed that defendant while constructing the building in his property encroached upon 2 feet space towards East-West and 40 feet towards North-South all along the eastern side of the property of the plaintiff. Defendant has thus illegally put up the building and therefore a suit in O.S No.194/1995 was filed for the relief of permanent injunction.

But defendant having filed the caveat petition, permanent injunction was not granted.

26. It is further deposed that taking advantage of the same, defendant illegally demolished the eastern wall all along the said house, and beyond total length of 40 feet on the North-South along with the bathroom situated on the northern end of the said lane and hurriedly constructed a new wall by encroaching the property of the plaintiff to the extent of 2 feet x 40 feet. Therefore suit filed in O.S No.194/1995 became infructuous and therefore the said suit was withdrawn with liberty to file fresh suit.

27. It is also deposed by the plaintiff that the defendant has no right to encroach upon 2 feet x 40 feet as his sale deed clearly mentioned that he has purchased the property to the extent of 18 feet x 116 feet.

28. Further plaintiff deposed that having caused a wrongful loss to the plaintiff's property, he sought for damages in a sum of Rs.10,000/-.

29. In his further examination-in-chief on 24.08.2004, plaintiff deposed that after the Court Commissioner executed

the commission warrant, he has filed objections stating that the measurement taken by the Court Commissioner is incorrect and it was noticed that 2 feet East to West and 40 feet North to South being encroached area was clearly depicted at the time of executing the commission warrant and defendant has constructed beyond the measurement of his sale deed without leaving any setback. Therefore sought for decreeing the suit.

30. He further deposed that in active collusion with the Municipal Authorities, defendant obtained the license in respect of 20 feet x 40 feet for construction of new house which is *per se* impermissible, having regard to the measurements found in the sale deed. He has further marked the documents vide Exhibits P-1 to Exhibit P-13 as referred to supra.

31. In his cross-examination, he admits that he had filed O.S No.15/1996 in respect of out-house and said suit is dismissed and the appeal is pending.

32. He denies the suggestion that the said suit was filed in respect of 2 feet x 21 feet.

33. He admits that he has filed a suit against Chaluvashetty for eviction of a petty shop measuring 2 feet x 2 feet and on

the southernmost boundary there exists a gutter and said gutter passes through one feet all along his property. He admitted that suit property is purchased by him from the children of Ramakrishnaiah and he has seen the sale deed in favour of Ramakrishnaiah from erstwhile vendor and the measurement shown in his sale deed is lesser than the measurements mentioned in Ramakrishnaiah's sale deed and said aspect has not been intimated by him to his advocate.

34. He admits that in Exhibit P-1 there is no mention as to how Ramakrishnaiah got the property and there is no mention as to the discrepancy with regard to the measurements between the two sale deeds. However, witness has answered that the said discrepancy has occurred as his vendors had altered the house after the purchase from their vendors.

35. He admits that in Exhibit P-1, it has been mentioned that the house is 80 years old and in Exhibit P-12, there is a mention as to the lane (oni) and its measurement is shown as 27 feet x 4 feet.

36. However, in the very next breath he says that in Exhibit P-12, measurement of oni is not mentioned. He admits that

there is a door on the western side of the suit property and such door was in existence from the date he purchased the suit property.

37. He admits that he had filed a petition before the Deputy Commissioner under the provisions of Municipality Act about the encroachment made by the defendant and against the said order passed by the Deputy Commissioner, writ petition was filed.

38. He admits that he had examined Sri Viswanath as one of the witnesses in O.S. No.15/1996. Further cross- examination was deferred as the witness did not co-operate with the Court for further cross-examination by answering the questions properly.

39. On 04.04.2005 he was further cross-examined, wherein he has pleaded ignorance that there was an order passed by the Municipality after 10.10.2001. He admits about filing of writ petition in WP No.14410/2002 and in the respect of oni there is no writ petition. The said writ petition was confined only to the validity of license.

40. He admits that the Municipality is not made as a party in the suit as per the instructions of his advocate. He admits Exhibit P-14. He denies that the second order passed by the Municipality is not produced by him as it is against his interest. He denies that by the second order, Exhibit P-14 is set aside.

41. He has answered that he does not know the contents of Commissioner's report and he did not hand over the copy of the sale deed to the Commissioner. He admits that he did not hand over the copy of the earlier sale deed.

42. He denies that the measurement mentioned in O.S No. 15/1996 is incorrect and he had the knowledge about the same.

43. He admits that on the southern side, oni measures about 4 feet and on the northern side it measures about $4\frac{3}{4}$ feet. He pleads ignorance about the measurement of that oni in his vendor's sale deed. He denies that after demolition of the big mud wall, as per the license when the construction has taken place, there is no encroachment made by the defendant. He denies that there was no damage caused to him by the construction of the new house by the defendant.

44. The wife of the plaintiff, Basamma is examined as PW-2. She has filed an affidavit in *lieu* of examination-in-chief, wherein she has deposed in line with the examination-in-chief of PW-1.

45. In her cross-examination, she admits about the filing of O.S No.15/1996 and pleads ignorance about the result of the said suit. She pleads ignorance that her husband-Rajaiah, one Veerappaji and Basavaraj were examined as witnesses. She has answered that she knows few facts about the suit and not in entirety. She admits that she has seen the sale deed executed in favour of Lalithamma and filing of the suit against Chaluvashetty. She says that petty shop occupied by Chaluvashetty was measuring East to West 2½ feet and North to South about 5 to 6 feet. She also admits about the existence of gutter. She admits that she is a teacher and she has studied upto SSLC. She pleads ignorance about the oral testimony made by her in O.S.No.15/1996 and she does not know the result of the said suit even on the date of cross-examination.

46. She has pleaded ignorance about filing of writ appeal against the orders passed in Exhibits P-15 and 16. She has stated that she does not remember the contents of Exhibit P-2. She admits the existence of oni in the sale deed executed in their favour for the purpose of light and air. She has answered that the wall on the western side of the defendant's property is a common wall, but the same is not mentioned in the sale deed of the plaintiff. She admits that she does not know the measurement or thickness of the said wall, but admits that said mud wall was removed and now there is a brick wall.

47. She admits that while furnishing the measurements in the sale deed, property in occupation of Chaluvashetty and gutter is also included. She has answered that at the time of execution of sale deed, whether measurements on the spot was taken or not is not known to her and is known to P.W.1.

48. An independent witness by name Viswanath is examined as PW-3. He has filed an affidavit in *lieu* of his examination-in-chief, wherein he has deposed that on the western side of the plaintiff's property, defendant has constructed a house and at that juncture defendant has encroached 2 feet East to West and 40 feet North to South. He has further deposed that defendant

has constructed the house beyond the measurements in his sale deed and also as against the Rules and Regulations of Town Planning Act.

49. In his cross-examination, he admits that he was also examined as a witness in O.S No.15/1996 filed by the plaintiff. He admits that he has not personally measured the alleged encroached portion. He has answered that he has not seen the measurements described in the sale deed of the vendor of the plaintiff. He has stated that the schedule mentioned in O.S.No.15/1996 and the present suit are different. He also admits that he has not measured the house of the defendant. He has stated that sale deed was executed on 02.09.1994 in favour of the plaintiff.

50. The sale deed executed in favour of the plaintiff and his wife jointly by power of attorney holder B.Shantha and N.R.Keshavan, is marked as Ex.P.1. In the sale deed, the measurement is shown as East to West $43\frac{1}{2}$ feet and North to South 32 feet and another item East to West measuring $11\frac{1}{2}$ feet North to South $31\frac{1}{2}$ feet and a passage measuring $4\frac{3}{4}+4 \times 27/2$.

51. Exhibit P-2 is the sale deed of the defendant. Measurement mentioned in the said sale deed is, East to West 18½ feet, North to South 116 feet with a country filed house with mud walls.

52. Exhibit P-3 is the sale deed dated 14.11.1957 in favour of Lalithamma, vendor of the plaintiff.

53. Exhibits P-4 to P-9 are the assessment registers and other revenue documents. Exhibit P-10 is the photograph showing the entrance to the bathroom on the Eastern side of plaintiff's property. Exhibit P-10(a) is the photograph of the wall abutting the defendant's property on the eastern side of the plaintiff's property. Exhibit P-10(b) is another photograph. Exhibits P-10(c) and (d) are yet another photographs.

54. Defendant-Vishnupadachar filed an affidavit in *lieu* of his examination-in-chief wherein he has stated that suit is not maintainable and another suit filed by the plaintiff in O.S No.15/1996 is dismissed.

55. He has further deposed that he has purchased the old house and constructed a new house and when he purchased the old house the walls were mud walls having width of 5 feet.

When he removed the mud walls and constructed the new house with brick walls, he got extra space of 2 feet and more on account of the width of the wall being reduced and the plinth area thus, got increased and he has not encroached any portion of the plaintiff's property nor caused any damage to the plaintiff's property.

56. He has further stated that on the western side of his house, there is a passage and later on the house of the plaintiff is situated. When such being the factual aspect, there cannot be any encroachment as is contented by the plaintiff. He also deposed that the measurement mentioned in the sale deed of the plaintiff is not the correct measurement and with deliberate intention, plaintiff has failed to produce the sale deeds of his vendor's vendor.

57. He further denied that the passage was not left in the property of the plaintiff on the eastern side. He denied having encroached any portion of the plaintiff's property nor constructed any 'chajja' (sun shade) or opened a window onto the property of the plaintiff.

58. In his further examination-in-chief, he has produced the documents and marked the same as referred to supra.

59. In his cross-examination, he has answered that as per the sale deed, measurement is shown as 18 feet x 120 feet. But when he demolished the old structure and constructed the new house, he has obtained license from the Municipality for the new house measuring East to West 20 feet and North to South 120 feet and before obtaining the license, he has furnished the plan to the Municipality and after verifying the same, he has furnished the plan to the Municipality.

60. He admits that as per Exhibit P-3, Municipality has granted permission for 18 feet but he has constructed 20 feet East to West. He has further stated that on the western side of his house, there is a passage and thereafter the property of the plaintiff is situated.

61. He has stated that when he purchased the property in the year 1979 itself, there was a passage of $43\frac{3}{4}$ East-West and 27 feet North-South was in existence. He has also answered that on the sanction of the plan, it is noted that on the western side there was a direction to leave 3.3 feet as set back. However, he

has answered that he has not left any setback area as there was a passage belonging to Municipality.

62. He has answered that, the municipality has first ordered that as per Exhibit P-14, passage belongs to plaintiff. But later on it was set aside and another order came to be passed. He has further answered that he did not get the house measured at the time of sale deed and whatever his vendor has told, the same measurements are mentioned in the sale deed.

63. He denied the suggestion that in active collusion with the Municipality officials, he has shown that the passage is belonging to Municipality and not to the plaintiff. He denied having illegally demolished the bathroom as seen in the photographs and caused loss to the plaintiff to the tune of Rs.50,000/-. He admits the white coloured wall in Exhibit P-10(b)/photograph belonging to his house and he does not know about the demolished wall seen in Exhibit P-10(b). He denied that the demolished wall seen in Exhibit P-10(b) is the wall between plaintiff and defendant. Further, he denied the suggestion that the schedule shown in O.S No.15/1996 and the present suit are different schedules.

EVIDENCE IN O.S.No.15/1996:

64. In O.S No.15 of 1996, plaintiff/Rajaiah is examined as PW-1. He deposed that he is the first plaintiff and suit property is situated in Kote Ramadevasthan Street. He has given the description of the suit property and stated that he purchased the suit property on 02.09.1994 from Srinivas and N.R.Keshav who are the children of Ramakrishna Iyengar. He also deposed about the existence of the defendant's property on the eastern side of the suit property measuring 18½ feet East-West and 116 feet North-South.

65. He further deposed that there was an old house situated measuring 18 feet x 40 feet. But in October 1995, plaintiff demolished the old house and started construction of new house. In that regard, he had filed a suit in O.S No.92/1995.

66. He has deposed that in the year 1987, defendant constructed on the back side of the old house, a structure measuring 17½ feet East to West, 35 feet North to South, without leaving any setback on its western side, i.e., on the eastern side of the plaintiff's property and he also constructed the first floor on the said house without obtaining the license and opened a window and a 'chajja' (sun shade) to the said

window on its western side i.e., eastern side of the plaintiff's property and left the rain water pipes onto the property of the plaintiff and in that regard when there was an enquiry, defendant high handedly completed the construction, opened the window and constructed the 'chajja'.

67. He has deposed about the appointment of Court Commissioner. But he has not properly measured the suit property. He further deposed that in O.S No.92/1995, towards northern side, suit property is situated. He has further deposed that encroachment made by the defendant is the subject matter of O.S No.92/1995. He further deposed that Commissioner has not obtained the signature on the Commissioner report at the spot, nor prepared any sketch at the spot and not obtained any signature on the sketch.

68. He has further deposed that memo of instructions filed by him is not adhered to by the Court Commissioner and specifically deposed that there is no 'oni' (passage) in between the property of the plaintiff and the defendant. He has marked the documents in respect to the suit property, like, assessment register extract etc. In his cross-examination, he has answered

that another suit has been filed with regard to the alleged encroachment of the 'oni' and sought for damages.

69. He has specifically admitted that he does not know how Ramakrishna Iyengar got the suit property and likewise how the vendor of Ramakrishna Iyengar got the property. He admitted that the wall that is situated on the eastern side of the property of the defendant was a mud wall and that has been removed and a brick wall has been constructed. He denies that there is a compound wall about 8 feet high on the western side. He admits that on the northern side, there is a compound wall and an outhouse.

70. At the next breath, he admits that on the northern side, on the east, there exists a house and a compound on the western side and the wall of his house is abutting the road. He admits about the filing of suit against Chaluvashetty, measuring 3 feet x 61 feet, which is part of his sale deed.

71. Likewise, he admits that 2 feet gutter is also part of his sale deed. He has stated that he did not deem it fit to produce the title deeds as to how Ramakrishna Iyengar got the property. He admits that he did not know the width of the mud

wall which was existing in the property of the defendant and he did not measure his house before filing the suit.

72. He admits that on the eastern side of his house there exists a oni (passage).

73. However, he volunteered to say that on the eastern side of his house, oni (passage) exists only to the extent of 27 feet and it belongs to him.

74. Smt.Basamma who is the wife of PW-1 is examined as PW-2. She has deposed in line with the examination-in-chief of PW-1.

75. In her cross-examination, she has stated that property the shop in occupation of Chaluvashetty belongs to them and it is measuring 3 to 4 feet in length and 3 to 4 feet in breadth. She admits that after the said shop, on the western side there is a door which leads to their house and thereafter there is a open yard (jagali). In the said open yard, there is also a gutter and it is triangular in shape and inasmuch as in the beginning it is 2 feet and it is shown in their sale deed.

76. She has specifically answered that when the Court Commissioner visited the spot she was very much present and in her presence commission work has taken place. However she has answered that the measurements given by the Commissioner is incorrect.

77. She admits that Exhibit P-14 was not in existence when the survey has taken place in their name and after the assessment, measurements have been included in Exhibit P-14. She admits that defendant has removed the mud wall and constructed the brick wall on the western side as well. She admits that there was no instructions to find out what was the mud wall and what is the thickness of the wall on the western side.

78. Veerappaji is examined as P.W-3 on behalf of the plaintiff. He is residing in front of the house of the plaintiff for last 25 years. He has deposed that when the new house was constructed by the defendant, they have put up a 'chajja' on the side of the plaintiff's property.

79. He has further deposed that the windows and 'chajja' is in first floor and Exhibit P-3/photograph is pertaining to the property of the defendant. He admits that the construction is

completed and there is an encroachment to the extent of 1½ feet to 2 feet in the property of the plaintiff.

80. In his cross-examination, he admits that he is resident of Chittanahally road of Holenarasipura town and plaintiffs are his castemen and are his relatives. He admits that he was residing in a house which is 10 feet away, as a tenant. He denies that the construction made by defendant is as per the plan and license.

81. Basavaraju is yet another witness who has been examined on behalf of the plaintiffs as P.W-4. He has answered that the house of plaintiff and dependent is opposite to Raghavendra Swamy temple and when the new construction was carried out by the defendant, windows are opened onto the plaintiff's property by encroaching about 2 feet. Said windows are in first floor.

82. In his cross-examination he admits that first plaintiff is his brother-in-law. He further admits that he did not measure the property of plaintiff and defendant and he had visited the house of the plaintiff about 4 to 5 years earlier to cross-examination.

83. A teacher by name Viswanath is examined as PW-5 who also deposed in his examination-in-chief about the encroachment made by the defendant.

84. He further deposed that in the property of the plaintiff, apart from the main house, there was an outhouse and defendant has constructed their building adjacent to the outhouse in the first floor and opened the window and constructed 'chajja' which is measuring about 3 to 3½ feet and rain water drain is kept which would fall in the property of the plaintiff.

85. He has identified the photograph marked at Exhibit P-3 and stated that the tiled roof house seen in the photograph Exhibit P-3 is outhouse portion of the plaintiff and white coloured structure found in Exhibit P-9 is that of the defendant.

86. In his cross-examination, he has stated that property of the plaintiff measures 49½ East to West and 61 feet North to South and there was a petty shop run by Chaluvashetty towards the west side of the property of the plaintiff and so also existence of a gutter which is also forming part of plaintiff's property. But he does not know the measurement.

87. He admits that he has not seen the width and height of the wall of the defendant before its demolition. He admits that before the sale deed were executed by Keshava and Srinivasa in favour of the plaintiff, he had perused the earlier sale deeds. He has answered that to the western side of the property of defendant, his elder brother's house is situated and there was a dispute between defendant and his elder brother with regard to conservancy lane.

88. He admits that 'chajja' was constructed in the year 1995 and admits that between the property of the plaintiff and defendant, there exists 3 feet oni (passage).

89. However, he has answered that defendant has encroached the said oni and has constructed the building. He admits that he is deposing about measurement based on the title deeds and he was not present when the Court Commissioner visited the spot.

90. He admits that he has not seen the sale deed of the defendant. He also admits that defendant removed the mud wall and later, constructed the brick wall width of which is 9 inches. He admits that Ex.P.3 was taken in the year 1995.

91. He admits that the wall abutting the outhouse was still in existence and he was not present when the photographs were taken.

92. Defendant got examined himself as DW-1. In his examination-in-chief, he has stated that he purchased his property in the year 1979 from Gudde Hosur Subramanya. At the time of purchase, property was having country-tiled roof house with mud wall. He has further stated that the mud walls were of 5 feet width. Thereafter, he removed the mud wall and constructed a house with RCC and at that juncture, he got extra space on the east and west side for construction of the brick wall in place of mud wall.

93. He has specifically answered that for rain water to drain, necessary pipes have been installed, outlet of which is inside his property. On the western side he has opened the windows and he has constructed 10 inches of 'chajja' in his property.

94. He has further answered that on the northern side, house of Sadashiva is situated and between his house and Sadashiva's house, there exists 3¼ feet width oni(passage). The outhouse portion existing in the plaintiff's property is

abutting the property of the defendant and the outhouse mud wall is still in existence in the property of the plaintiff.

95. He has specifically deposed that the rain water coming from terrace of his property is allowed to flow on the northern side of his property into the passage and not into the plaintiffs' property. He has specifically deposed that another suit is filed by the plaintiff on the file of Senior Civil Judge earlier to filing of the present suit.

96. He has also deposed that the measurements mentioned in the plaintiff's sale deed is incorrect and certified copy of his sale deed is placed on record.

97. He has also deposed that when the Court Commissioner visited the suit property for spot inspection as per the orders of the Court, plaintiff deliberately did not furnish the sale deeds to the Court Commissioner. He has further answered that the windows on the western side of his property were existing earlier also and no hardship is caused by opening the windows on the western side and thus sought for dismissal of the suit.

98. In his cross-examination, he has answered that his house is now measuring East to West 20 feet and North to South 116

feet and he has constructed the house in the entire site. He further answered that in the year 1970, he had constructed the building measuring East to West 20 feet North to South 80 feet which was only a ground floor and in the year 1995 he constructed the first floor.

99. He has further answered that about six years earlier to the date of cross-examination, he has constructed a new house after demolishing the old house on the southern side of the property. He denied that the outhouse portion was abutting on the southern side of the property of the defendant.

100. He admits that in the sale deed, there is no mention about the oni on the western side. He also admits that he has not produced the plan and license obtained from the Town Planning Authority. He has specifically answered that 'chajja' constructed by him is in his property and is not in the property of the plaintiff. He denied having encroached 2 feet of the property of the plaintiff.

101. Based on the aforesaid evidence, both the suits were dismissed by the Trial Court.

102. Against dismissal of those suits, plaintiff filed R.A.No.32/2007 in respect of O.S.No.92/1995 and R.A.No.26/2002 in respect of O.S.No.15/1996.

103. Learned Judge in the First Appellate Court allowed those appeals.

104. The operative portions of the orders of the First Appellate Court are culled out hereunder.

R.A.No.32/2007:

"The appeal filed by the appellants under Order 41 Rule 1 r/w Section 96 Code of Civil Procedure is hereby allowed with cost.

The judgment and decree passed by the learned Civil Judge (Jr.Dn.) in O.S.No.92/1995 dated 24/2/2007 is hereby set aside.

The suit of the plaintiff is hereby partly decreed it reads as follows: it is ordered and decreed by declaring the plaintiff is the owner of the space measuring East-West 2 feet, North-South 40 feet, situated in Kote Ramadevara Temple Street, Assessment 1850, bounded by East-The defendant's property purchased under the sale deed dated 24-9-1979, West-The plaintiff's property purchased under the sale deed dated 9-9-1994 North-The space forming part of plaintiff's said property and South-

Kote Ramadevara Temple Street, Holenarasipura Town.

It is further ordered and decreed the plaintiff is entitled for damages for a some of Rs.51,000/- from the defendant with cost.

It is further ordered and decreed the plaintiff is at liberty to recover the damages of encroachment made by the defendant 1½ x 40 feet of his property towards eastern side of his property by filing necessary suit within 3 months from the date of this judgment as per law."

R.A.No.26/2002

The appeal filed by the appellants under Order 41 Rule 1 r/w Section 96 Code of Civil Procedure is hereby allowed with cost throughout.

The judgment and decreed passed by the learned Civil Judge (Jr.Dn.) in O.S.No.15/1996 dated 15/2/2002 is hereby set aside.

The suit of the plaintiff is hereby decreed on the following terms.

It is ordered and decreed by declaring the plaintiff is the owner of the suit schedule property i.e., area measuring east-west 1½ feet and north-south 21 feet situated at Kote Ramadevaru Temple Street, Holenarasipura Town assessment No.1850.

It is further ordered and decreed the defendant is directed to demolish the Sajja constructed on the western side of the wall of the defendant to remove windows and close the said windows permanently by granting a decree of mandatory injunction. Failing compliance the plaintiffs is at liberty to got execute which is decree and to remove the sajja and to close the windows. Therefore, the Court agency and he has got liberty to recover of the cost and expenses incurred by him.

It is further ordered and decreed the plaintiff is entitled for possession of the sajja portion as prayed for.

It is further ordered and decreed restraining the defendant their agents are their legal representatives perpetually from interference with the plaintiff peaceful possession and enjoyment of the schedule property stated supra bounded on east. The defendant property purchased under sale deed dated 24/9/1979 west the plaintiff property purchased under sale deed dated 2/9/1994 north Sadashivappa property, south remaining plaintiff property purchased under the sale deed dated 2/9/1994 by granting a decree of permanent injunction."

105. Being aggrieved by the same, these three Second Appeals as referred to supra have arisen. Two appeals are filed by the defendant and one appeal by the plaintiff.

106. Based on the above factual aspects and the substantial questions of law which were framed earlier and, subsequently modified by the order of this Court, Sri D.R.Ravishankar, learned Senior Advocate for the appellant in RSA No.198/2010, would contend that, when the First Appellate Court decreed the suit of the plaintiff in O.S No.92/1995 and O.S No.15/1996 by allowing the R.A No.32/2007 and R.A No.26/2002 respectively, ought to have granted decree of mandatory injunction as prayed for and failure to grant the mandatory injunction as is claimed in O.S No.92/1995 has resulted in grave miscarriage of justice.

107. He would further contend that the description given in the plaint in O.S No.92/1995 and O.S No.15/1996 is not in variance to each other, but it is a comprehensive description as the sale deed of the plaintiff from his vendor consisted of different portions and assessed differently by the revenue authorities. Thereby, the suit property having common door No.1466 with specific boundaries as is mentioned in Exhibit P-1, Exhibit P-12, Exhibit P-4 to Exhibit P-9, would clarify that the suit properties are one and the same.

108. He would further point out that the variation if any which is highlighted by the defendant is on account of variation in the measurements described about the main house and backyard separately. He further contended that the measurement mentioned in the sale deed to the effect that total measurement 49 feet x 61 feet and passage mentioned measuring $4\frac{3}{4}+4 \times 27/2$ feet when read as a whole as per Exhibit P-12, would work out to 51 feet East West and 61 feet North South. Therefore, the first substantial question of law that whether the First Appellate Court was justified in proceeding to reconcile the varying descriptions of the suit property is just and proper, should be answered in favour of the plaintiff.

109. Insofar as the second substantial question of law, Sri D.R.Ravishankar contended that defendant did not understand the meaning in its true sense as to the orders passed in WA Nos.4683/2002 and 4685/2002. He would clarify that this Court in the writ jurisdiction did not declare the disputed passage as the property belonging to Municipality. The order passed by the learned Single Judge clarifies that the order of the Deputy Commissioner vide Exhibit P-15 is quashed and

directed the Municipality to decide the matter after the outcome of the Civil Court proceedings.

110. He contended that, W.A Nos.4683/2002 and 4685/2002 before the Division Bench of this Court was only with regard to quashing of Deputy Commissioner's order and it did not adjudicate upon the title or ownership of the disputed passage. As such, there is no conflict between the Civil Court decree and the Appellate Court decree and thus sought for answering the second substantial question of law in favour of the plaintiff.

111. Insofar as additionally framed substantial questions of law is concerned, Sri Ravishankar would contend that Commissioner's report is improper and Commissioner has accepted the documents from the defendant at the time of executing the Commissioner warrant. The memo of instructions given by the parties is not adhered to and therefore, refusing to grant mandatory injunction even after decreeing the suit of the plaintiffs declaring that plaintiffs are the owners of the suit property has resulted in grave miscarriage of justice and sought for allowing the RSA No.198/2010 filed by the plaintiffs and for dismissal of the RSA Nos.337 and 339/2010 filed by the defendant.

112. He would further emphasize that the Court Commissioner in his cross-examination candidly admitted that documents relied on by him were procured by the defendant's counsel at the spot which fact demonstrates that there was an undue proximity between the defendant and the Court Commissioner whereby the Commissioner's report was tainted and should not have been relied on by the First Appellate Court.

113. He further contended that the finding recorded in the sketch marked at Exhibit C-2 and the report of the Commissioner marked at Exhibit C-1 to the effect that 'there is no encroachment' is thus erroneous having regard to the conduct of the Court Commissioner. The influence exerted by the counsel for defendant on the Court Commissioner would make it clear that Commissioner report was not a fair report and therefore, sought for allowing RSA No.198/2010 and dismissal of RSA Nos.337 and 339/2010.

114. He also contented that, the First Appellate Court failed to note the suit prayer in O.S.No.15/1996. Prayer of mandatory injunction sought for by the plaintiff ought to have granted by directing the defendant to close the window and to remove the

'chajja', as those constructions were up against the sanction plan and therefore, appeal in RSA 198/2010 needs to be allowed.

115. He would further contend that, the defendant has admitted that there is 1½ feet encroachment which binds the defendant and conclusively establishes the plaintiffs' case. He also pointed out that it is the local Municipality which is root cause for the litigation between the parties and Municipal Authorities arbitrarily changed the assessment extract contrary to its own records which stood for several decades and thus, the First Appellate Court rightly disregarded the subsequent illegal entry found in the assessment register extract. Therefore, the additional substantial question of law raised in the appeals filed by the defendant is to be answered against the defendant and mandatory injunction is to be granted by decreeing the suit in O.S Nos.92/1995 and 15/1996 in *toto*.

116. *Per contra*, on behalf of the defendant, Sri Srinivasa Raghavan.V, learned Senior Advocate would contend that the First Appellate Court was justified in denying the mandatory injunction and therefore, RSA No.198/2010 is to be dismissed as there was no encroachment at all.

117. In support of the substantial questions of law raised in RSA Nos.339/2010 and 337/2010 Sri Srinivasa Raghavan V would submit that the allegation in the plaint that there is $4\frac{3}{4}$ x 27 feet lane on the eastern side of the plaintiffs' property as is made in paragraph 3 of the plaint in O.S No.92/1995 itself is incorrect.

118. He would further contend that there was no encroachment of 2 feet x 40 feet in the said lane or the oni. In this regard, he specifically points out the report of the Court Commissioner and sketch marked thereon which are exhibited and marked as Exhibit C-1 and Exhibit C-2, wherein the dimension of the existing lane is mentioned as 4 feet+4.6 feet /2x33 feet continues to exist in the eastern portion of the plaintiffs' property. As such, as per the plaint averments coupled with the evidence of the Court Commissioner, there is no encroachment at all in the lane as alleged in the suit and, defendant never disputed the title of the plaintiff in respect of his property, but the measurements mentioned in the sale deed of plaintiffs is incorrect.

119. He would further point out that there is a clear admission that shop of Chaluvashetty was in existence and there was a litigation. So also, existence of gutter within the plaintiffs' property if taken into consideration, plaintiffs' property is still in existence as per the sale deed and plaintiff cannot exclude those portions of the property and try to lay claim on the defendant's property. Thus, there is no encroachment made out and as such, the appeal of the plaintiffs is to be dismissed and appeals of the defendant are to be allowed.

120. He would further contend that prayer of the plaintiffs based on the plaint averments, the *lis* is not whether the defendant has built the structure as per the dimensions of his own property or as per the approved plan. But it was all about the encroachment when the defendant has constructed the new house after demolishing the old house.

121. He would point out in this regard that, plaintiffs utterly failed to prove that there was an encroachment of 2 feet x 27 feet in the existing lane of 4 feet x 27 feet. Therefore, denial of mandatory injunction by the First Appellate Court is just and proper.

122. He also points out that there was no pleading or it was nobody's case that lane existed to an extent of more than 5 feet which has been reduced into 4 feet. The contents of the sale deed in this regard is worth noticing and so also the oral admissions made by the plaintiffs in this regard.

123. He would point out that the Court Commissioner report and the order of the Division Bench of this Court in WA Nos.4683/2002 and 4685/2002, it is clear that lane still exists and no construction has been made on the said lane irrespective of the title between the parties and therefore the finding that there is no encroachment needs to be maintained.

124. He also pointed out that as per the sale deed dated 02.09.1994 market Exhibit P-1, there is no mention of existence of lane measuring 4 feet x 27 feet and there is no title in that regard.

125. It is his further arguments that Municipality records as per Exhibit P-5 to Exhibit P-7 clearly shows that the property that stood in the name of the plaintiffs' vendor was only to the extent of 44½ feet x 61 feet. How the property could be sold by the vendors to the extent of 49¼ feet when their vendors

possessed only 44 ½ feet East-West is a question that remains unanswered by the plaintiff and therefore, the title is not proved by the plaintiff with regard to the lane. As such, appeals of the defendant are to be allowed in declaring that plaintiffs are the owners of the property as per measurements in Exhibit P-1 and declaration could only be to the extent of 44½ feet x 61 feet as per Plaintiffs' own document marked at Exhibit P-5 to Exhibit P-7 and sought for allowing the appeals of the defendant and dismiss the appeal of the plaintiff.

126. He further pointed out that plaintiffs themselves are not clear as to their own title and Exhibit P-14 is admitted in the cross-examination where there is an endorsement to the effect that existence of 3 feet lane between plaintiffs' property and property of the defendant.

127. He also points out that in Exhibit P-1 there is no indication as to which side of the property measures 51 feet as it is undisputedly shown in the Court Commissioner's report that plaintiffs' property is narrower in the front portion towards the south and it is little larger on the hind portion measuring 42½ feet + 1½ feet that is to the extent of 44 feet compared to

the hind portion on the northern side wherein it is measuring 51½ feet.

128. In other words, even as per the measurements of the property and what is existing on the spot, there is a variance in the measurement on the front side that is on the southern side and back side on the northern side and it is not a rectangular portion and it is oblique in nature. Therefore, the plaintiffs are unable to make out existence of the property as per the sale deed and when such is the factual aspect, as could be seen from the material on record including the documents, suit for mandatory injunction seeking to remove the structures which is constructed well within the boundaries of the defendant, is rightly refused by the First Appellate Court and declaration of title to the plaintiffs' property should be to the actual measurement available on the spot and not as per the said deed marked at Exhibit P-1 and thus sought for allowing the appeals of the defendant and to dismiss the appeal of the plaintiff.

129. With regard to closure of windows and 'chajja', Sri Srinivasa Raghavan would point out that admittedly windows and 'chajja' are placed by the defendant on the wall

constructed by him on the western side of his property. If the plaintiffs' case is for declaration of the title lane measuring 4 feet x 27 feet on the eastern portion of his property and if he fails in establishing that aspect, the prayer of closure of windows and 'chajja' would fail automatically.

130. He also pointed out that those windows were existing in the ground floor as could be seen from Exhibit P-8 to Exhibit P-11, which are the photographs marked in O.S No.15/1996 and therefore, no cause of action has arisen when the old building is removed and a new building has been constructed.

131. It is also his case that there was a clear admission by PW-1 in OS No.15/1996 that there existed a old house on the ground floor in the defendant's property since 40 to 50 years and windows were placed on the wall of the defendant's property. Therefore, there is no question of new cause of action to seek for closure of windows and 'chajja' and thus sought for allowing the appeals of the defendant and dismissal the appeal of the plaintiffs.

132. He further argued that the First Appellate Court erroneously held that encroachment of plaintiff's property by

defendant is putting up the windows and 'chajja' and improperly placed the burden on the defendant to show that construction is in accordance with the sanction plan and the sale deed while burden solely rested on the plaintiff who is the one who sought for the declaration and consequential relief and thus sought for dismissal of the appeal of the plaintiffs.

133. He also pointed out that, if the declaration of the title to the plaintiff's property is upheld by this Court, then noting the fact that there is no encroachment made by the defendant, appeal of the plaintiffs be dismissed.

134. Having heard the arguments of both sides, this Court perused the material on record meticulously.

135. On such perusal of the material on record, there is no dispute that property of the plaintiffs and defendant are adjacent to each other. There is dispute with regard to the actual land available on the spot as per the sale deed of the plaintiff when compared to the Commissioner's sketch as well as the existing structure of the defendant as per his sale deed.

136. While plaintiff maintains that measurement shown in the sale deed is the property belonging to him, while describing the

suit schedule property in bits which were separately assessed, there is discrepancy.

137. It is to be noted that plaintiffs having approached the Court with a declaratory prayer and consequential relief of mandatory injunction and possession, was thus duty bound to establish that the property is in existence as per the measurements mentioned in the sale deed. The discrepancies are evident from the Court records even as per the documents that has been placed on record by the plaintiffs themselves vis-a-vis the oral evidence.

138. In O.S No.92/1995, which is filed before the Senior Civil Judge and O.S No.15/1996 which is filed before the Civil Judge Court, description of the suit property is not properly mentioned.

139. Moreover, plaintiffs claim that there existed a lane or oni measuring 4 feet on the southern side $4\frac{3}{4}$ feet on the northern side in his property in which the defendant has encroached and constructed the building to the extent of 2 feet x 27 feet on the eastern side.

140. In other words, the *lis* is only with regard to encroachment of 2 feet x 27 feet in the lane that existed in the plaintiffs' property. In that regard, plaintiffs were required to establish the said fact with necessary oral and documentary evidence on record about the existence of lane or the *oni*.

141. Plaintiffs and their witnesses have categorically admitted in both the suits as referred to *supra* that there was a petty shop rented out to Chaluvasetty. With regard to the measurement of the said shop, plaintiff, his wife and his witnesses have given different measurements.

142. Be it what it may. There is suppression of existence of said shop in the plaint in both the suits. It is only when the said aspect is questioned in the cross-examination, plaintiff has stated about the existence of said shop.

143. In other words, there is no mention as to the existence of petty shop as well as the existence of the gutter. Even with regard to the gutter which is inside the property according to the plaintiff and his witnesses, there are varied versions.

144. Thus, one can easily infer from the material evidence on record that there exists a gutter measuring 1½ feet in width.

In other words, if measurement of 1½ feet width for the gutter is to be included into the plaintiffs' property, the measurement of the plaintiffs' property as per the sale deed varies when it is excluded from the plaintiffs' property.

145. Admittedly, the gutter cannot be the property of the plaintiff as it is for the public use.

146. Nevertheless, Commissioner's report in this regard throws some light onto the existing structure of the plaintiffs' property as well as the defendant's property.

147. No doubt, Sri D.R.Ravishankar, specifically argued that the Commissioner's report cannot be accepted having regard to the fact that he accepted few documents from the custody of the counsel for defendant at the time of inspection and his report is tainted.

148. Nevertheless, the Commissioner is subjected to detail cross-examination. As could be seen from the records, Commissioner has carried out the spot inspection after the Court settled the memo of instructions filed by both the parties and formulated the points to be looked into while carrying out the Commissioner work as referred to supra.

149. Thus, argument on behalf of the plaintiff that Commissioner has exceeded in his jurisdiction and not adhered to the memo of instructions filed by the plaintiff cannot be countenanced in law.

150. Further, in his cross-examination Commissioner was true enough to admit that he received the documents from the counsel for the defendant.

151. However, there is a clear admission on behalf of the plaintiff that they did not furnish any document to the Commissioner to substantiate the memo of instructions.

152. What prevented the plaintiffs to furnish the necessary documents is a question that remains unanswered. More so, PW-2 Basamma was present at the time of spot inspection. When it is the plaintiffs who have approached the Court with a prayer for declaration and consequential relief and the entire burden was on the plaintiffs to establish the fact of encroachment with measurements in the sale deed.

153. Further, when there is a dispute as to the very existence of the property as claimed by plaintiffs and variance in the

measurements as per the sale deed, on what basis and which portion the declaratory decree is to be granted itself is a question.

154. Nevertheless, since the defendant has not disputed the occupancy of the property by the plaintiff to the extent of his house and the vacant land and maintained that he has constructed within his property, declaratory relief as granted by the Trial Court, less the measurement of the petty shop and the gutter taken into consideration can be maintained.

155. If that is taken into consideration, then there is no encroachment on to the suit property as is held by both the Courts.

156. No doubt, there is an admission on record elicited by the plaintiff from defendant that the property is constructed by the defendant to the extent of 20 feet East to West and 116 feet North to South as against the sale deed measurement of defendant to the extent of 18½ feet x 116 feet.

157. But in this regard defendant has given the specific explanation before the Court that when he purchased the

property there was a country-tiled roof house and walls were constructed using mud which was huge in size.

158. It is his case that when he removed the mud wall, he got extra space of 2 feet. Therefore, he has constructed 20 feet East West and 116 feet North South.

159. Admittedly there is also admission elicited in the cross-examination of PW-1 that when the old house was in existence, in the ground floor the window was available as is now placed by the defendant in the first floor. In other words, when the very same window was in existence when the defendant purchased the property, only after the new construction has been raised there cannot be any objection by the plaintiff with regard to the opening of the window by the defendant, that too in the first floor.

160. No doubt there is an intervening factor in the case of the parties about the existence of municipal lane. In that regard, revenue proceedings have taken place and matter had come up before this Court in writ petition and writ appeal as referred to supra. It was necessary for the plaintiffs to implead Municipality as a party to the suit to thrash out the dispute in

this regard. But, plaintiffs failed to do so. At least, any official could have been summoned to establish the claim of plaintiffs with aid of municipal records. But, no such effort is made.

161. Taking note of the fact that there is a categorical finding recorded that there is no encroachment at all by the defendant into the plaintiffs' property, this Court is of the considered opinion that the scope of the *lis* would not require this Court to answer about the revenue proceedings as there is a direction issued to the revenue authorities after disposal of the civil litigation to enquire into the said aspect of the matter.

162. Yet another aspect that is required to be considered, by this Court in these appeals is about the construction carried out by the defendant beyond the sanction plan without leaving setback and constructing the property beyond the sale deed measurements.

163. As rightly pointed out by Srinivasa Raghavan, that issue was not raised having regard to the prayer in the suit and in the absence of any counter claim.

164. Thus, whether at all the defendant has constructed against the sanctioned plan, is a question that has to be adjudicated in a separate proceedings.

165. Trial Court in both the suits did take into consideration these aspects of the matter and rightly dismissed the suit of the plaintiffs having regard to the fact that encroachment is not proved.

166. However, First Appellate Court while dealing with these aspects of the matter, without there being any issue with regard to the construction being not carried out as per the sanction plan, recorded a finding that there is a violation of sanction plan.

167. However, First Appellate Court, also noted that since there is no encroachment, mandatory injunction cannot be granted.

168. In other words, the opinion of the First Appellate Court in this regard that since there is no encroachment, rejection of prayer of mandatory injunction is thus just and proper.

169. Likewise, since the plaintiff has proved his case about the title to the suit property though there is a variation with regard to the existing space as per the sale deed of the plaintiff, since the defendant has not objected for the title of the plaintiff as it exists on the spot, declaratory relief granted by the First Appellate Court reversing the judgment of the Trial Court needs no interference even though there is a admission by the plaintiff that he did not refer to the earlier sale deeds while getting the sale deed registered. Be it what it is.

170. Having said thus, when the plaintiff is not having clarity and there is a varied version between the oral testimony of PW-1 and his wife PW-2 who admits the existence of oni in between the plaintiffs and defendants' properties, so also, when there is an admission by the plaintiff's witnesses in OS No.15/1996 and PW-5 who is a teacher has deposed what has not been deposed by the PW-1 or PW-2 would only go to show that there exists a doubt as to the actual measurement of the property which is in occupation of the plaintiff vis-à-vis his sale deed.

171. This would take this Court to the substantial question of law framed in RSA No.337/2010 on 17.04.2026.

172. The plaintiffs were unable to make out the exact suit measurement that there is conciliation as to the discrepancy that has been carried out by the First Appellate Court with regard to the boundaries mentioned in O.S.No.92/1015 and O.S.No.15/1996.

173. This Court has to answer the said substantial question of law in the negative, since there exists discrepancy as to measurements and plaintiffs were not able to place before the Court exact measurement of the suit property which their vendors got it by respective sale deeds and what is exactly available on the spot. Said discrepancy in measurements has been specifically answered by the Court Commissioner in his report, which has been accepted by the First Appellate Court. Having thus accepted the Commissioner report, the First Appellate Court could not have issued the mandatory injunction in favour of plaintiff directing the defendant to close the window in the first floor and removal of chajja. Said reasoning would not stand to reasons or logic. Moreover, when there is a specific finding that there is no encroachment and there is an admission that there existed the window in the ground floor in the old house when the defendant purchased the property,

plaintiffs cannot have any objection for opening the window within the property of the defendant.

174. Furthermore, with regard to existence of oni belonging to Municipality or otherwise vide Exhibits P-14 and P-15 which was subject matter of writ proceedings, since there is a direction to the municipality to enquire into the matter after disposal of the suit, no mandatory injunction could have been issued by the First Appellate Court, especially when P.W.2 being wife of the plaintiff-Rajaiah has specifically admitted existence of oni, so also witnesses of the plaintiffs.

175. Moreover, as already pointed out, nothing prevented the plaintiffs to implead the municipality as a party to the suit and establish the fact that oni is the property of the plaintiffs.

176. At least, an official from the Municipality could have been summoned to speak about the discrepancy in the assessment extracts filed by plaintiffs themselves wherein there are variance with regard to existence of plaintiffs' property and the oni as well.

177. In the absence of any such attempt being made, this Court is of the considered opinion that direction by the First

Appellate Court to close the window and remove the chajja cannot be sustained in the eye of law. Accordingly, RSA No.337/2010 needs to be allowed by answering the substantial question of law raised on 17.04.2026 in the negative.

178. Therefore, viewed from any angle, this Court is of the considered opinion that rejection of the prayer of mandatory injunction even after the suit of the plaintiffs came to be decreed declaring that plaintiff is the owner of the property is just and proper not only on the ground as to the discrepancy in the measurement of the property, but also on the ground that there is a categorical finding recorded by both the Courts that there is no encroachment by the defendant as to the suit property.

179. Thus, from the above discussion, the substantial questions of law raised are answered as under:

- (i) The first substantial question of law framed on 11.02.2010 in RSA Nos.337/2010 and 339/2010 is answered partly in the affirmative and second substantial question of law is also answered partly in the affirmative, subject to further proceedings before the Municipality as per order in writ proceedings.

(ii) The substantial question of law raised on 17.04.2026 in RSA Nos.198/2010 and 339/2010 is answered in the affirmative.

(iii) The substantial question of law raised on 17.04.2026 in RSA No.337/2010 is answered in the negative.

180. Consequently, following:

ORDER

- (i) RSA Nos.198/2010 and 339/2010 are ***dismissed***.
- (ii) RSA No.337/2010 is ***allowed***.
- (iii) No order as to costs.

Sd/-
(V SRISHANANDA)
JUDGE

kcm