CASE NO.:
Appeal (civil) 658 of 2001
Special Leave Petition (civil) 3978 of 2000

PETITIONER:
AYYAPPALLY MOHAMMED HAJI & ORS.

Vs.

RESPONDENT:
M. M.ABDULSALAM & ORS.

DATE OF JUDGMENT: 17/01/2001

BENCH:
S.R.Babu, S.N.Variava

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J
J U D G M E N T S. N. VARIAVA, J.

Leave granted. Heard parties. This Appeal is against a Judgment dated 5th August, 1998 by which the Second Appeal filed by the Respondents has been allowed. Briefly stated the facts are as follows: One Sainabi was the owner of the entire property in respect of which the present suit arises. She sold a portion of the property to the Respondents by a registered Sale Deed dated 16th April, 1968. For sake of convenience these properties are referred to as "Plaint A Schedule property. Sainabi thereafter sold to the Appellants the remaining portion of the property by a registered Sale Deed dated 27th March, 1971. For sake of convenience, these are known as "Plaint B Schedule property". The Appellants raised construction on "Plaint B Schedule property". According to the Respondents this construction encroached into "Plaint A Schedule property". The Respondents thus filed a Suit for a perpetual injunction restraining the Appellants from encroaching into "Plaint A Schedule property" and for removal of the construction put up by them to the extent that it encroached into "Plaint A Schedule property". The Appellants denied that they had encroached upon "Plaint A Schedule property". At this stage, it must be mentioned that in the Plaint, as it was originally filed, there was no reference to a Plan which had been attached to the Sale Deed dated 16th April, 1968. In the Plaint the properties were described by referring to the Schedule to the Sale Deed dated 16th April, 1968. The Trial Court, going by the description of the properties given in the Plaint and on the basis of a report of the Commissioner, dismissed the suit holding that there was no trespass. The Respondents then filed Appeal No. 179 of 1983. In this Appeal the Respondents applied for amendment of the plaint to incorporate measurements shown in the Plan attached to the Sale Deed dated 16th April, 1968. The Appellate Court allowed the Application for amendment and remanded the Suit back for trial afresh. The Appellants filed Civil Misc. Appeal No. 215 of 1984 challenging the Order of remand. They also challenged the Order allowing the Application for

amendment. The Appellate Court held that the amendment should not have been allowed as a new case was sought to be made out. The Appellate Court disallowed the amendment and dismissed the Suit. Aggrieved by this Order the Respondents filed C. A. No. 2655 of 1986 before this Court. This Appeal was allowed by this Court. It was, inter alia, held as follows: "After hearing learned counsel for the parties we are satisfied that the High Court having come to the conclusion that the learned Subordinate Judge should not have allowed the amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure, the proper course for the High Court to have adopted was to set aside the judgment and order passed by the learned Subordinate Judge remanding the suit for re-trial. The High Court was clearly in error in dismissing the plaintiffs suit. It should have remitted the appeal to the learned Subordinate Judge for hearing afresh on merits on the basis of the pleadings of the parties as they exist. (Emphasis supplied)

The result therefore is that the appeal is allowed. The judgment and order of the High Court dismissing the plaintiff's suit is set aside and the appeal is remanded to the court of Subordinate Judge for decision afresh on merits."

Thus, it is to be seen that the Order disallowing amendment was upheld. This Court remanded the case to be heard afresh on merits on the basis of pleadings of the parties as they existed. These observations are in an Appeal filed by the Respondents against an order disallowing amendment of the Plaint. To be remembered that by this amendment Respondent had sought to rely upon the measurements in the plan. The observations of this Court therefore clearly mean that these measurements could not be looked into. The Appeal was then taken up for hearing. The Appellate Court held that there was encroachment in respect of portions shaded Red in a Plan which was marked as Ext. C-5. The Appellants were directed to remove those encroachments. It was held that there was no encroachment on the other portions. As regards other portions the Suit was dismissed. The Respondents then filed Second Appeal No. 59 of 1990. The Appellants filed cross objections in the second Appeal. Both have been disposed off by the impugned Order dated 5th August, 1998. By this Order the Appellate Court's Order upholds that portion of the Order of the lower Appellate Court which holds that there is encroachment in the portion shaded Red in the Plan Ext. C-5. The directions regarding removal of those encroachments are also upheld. It has further been held that there is encroachment in respect of the other portions as claimed by the Respondents. However, instead of directing removal of those encroachments the Respondents have been awarded Rs. 10,000/- towards compensation in respect of those intrusions. In coming to these conclusions, the learned Judge has held that even though the amendment was not allowed the Court could still look at the Plan annexed to the Sale Deed dated 16th April, 1968, as the Plan formed an integral part of the Sale Deed. Mr. Krishnamurthy assailed the Judgment on the ground that once the amendment was not allowed the Plan could not be looked at. He further pointed out the Commissioner's report and portions of the impugned Judgment to show that if the Plan was not looked at, then there was no encroachment at all. On the other hand, Mr. Balakrishnan has supported the Judgment. He submits that the Plan is an integral part of the Sale Deed dated 16th

April, 1968 and thus could be looked into even though amendment was refused. He further submits that even if one does not look at the Plan and proceeds only on the basis of the description of the property as given in the Plaint, it is established that there was encroachment in the portions shaded Red in the Plan Ext. C-5. He submitted that this is a finding of fact which has been confirmed in Second Appeal. He submits that there is no error in this finding. Mr. Balakrishnan points out, as regards the other portions, that the Courts have found that the only encroachment was that some sun-shades and certain drain pipes have been put on a wall belonging to the Appellants and that these abut into Respondents' property. He submitted that instead of directing removal of the sun-shades and drain pipes a sum of Rs. 10,000/- has been given towards compensation. He submitted that, therefore, there is no error in sustained. the impugned Judgment and the same should be We have read the pleadings. We have looked at the Commissioner's Reports. We have also seen the descriptions of the property as given in the two Sale Deeds and the schedules to the Sale Deeds. In our view, the learned Judge was not right in holding that even though the amendments had not been permitted the Plan annexed to the Sale Deed dated 16th April, 1968 could be looked at. In so holding the learned Judge has ignored the directions of this Court, wherein it was categorically directed that the matter is to be heard on the basis of the pleadings of the parties as they existed. On the pleadings as they existed, there was no reference to the Plan. Of course, there is reference to the Sale Deed dated 16th April, 1968. However in this Sale Deed there is discrepancy between the description of the property as given in the Schedule to the Sale Deed and the description given in the Plan annexed to the Sale Deed. In the Plaint the Respondents/Plaintiffs had chosen to rely upon the description as given in the Schedule to the Sale Deed dated 16th April, 1968. Once the Respondents/Plaintiffs themselves chose not to rely upon the measurements as set out in the Plan annexed to that Sale Deed, and their attempt to belatedly rely on the same was disallowed, it was not open to them to thereafter rely on those measurements. To allow them to do so would be to ignore the categoric direction of this Court that the hearing was to be on basis of the pleadings as they existed. It must also be mentioned that if one goes by the description given in the Schedules to the two Sale Deeds, then there is no discrepancy in the two Sale Deeds. However, if one takes the measurements in the Plan annexed to the Sale Deed dated 16th April, 1968, then there would be discrepancy in the description of the properties as sold to the Respondents and the Appellants. For this reason also the measurements given in the Plan could not be looked at.

If the measurements given in the Plan are not looked then one has to proceed on the basis of the description given in the Schedule to the Sale Deed dated 16th April, 1968. Having seen the same we are in full agreement with the finding of the lower Appellate Court that there is encroachment in respect of the portion marked in Red in the Plan Ext. C-5. The lower Appellate Court has given very cogent and correct reasons for coming to this conclusion. We are in full agreement with those reasons. On the basis of the description as given in the Schedule to the Sale Deed dated 16th April, 1968, there is no encroachment in any other portion of "Plaint A Schedule property". To that

extent the findings in the impugned Judgement, arrived at by relying upon the Plan annexed to the Sale Deed are not correct. As there is no encroachment in respect of the other portions there was no question of awarding compensation of Rs. 10,000/- to the Respondents. Therefore the portion of the impugned Judgment wherein it is held that there is encroachment on other portions and by which compensation is awarded requires to be and is set aside. However the portion upholding the Decree of the lower Appellate Court is maintained. Accordingly, the Appeal is partly allowed to the extent set out hereinabove. There will be no Order as to costs.