

Vadivel Vs. Saminathan

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Court : Chennai

Decided On : Jun-26-2012

Judge : M.Venugopal, J.

Acts : [Code of Civil Procedure,\(CPC\) 1908](#) - Section 100, Order 20 Rule 12, 5 Order 41 Rule 31(a)

Appeal No. : S.A.No.585 of 1999

Appellant : Vadivel

Respondent : Saminathan

Advocate for Def. : Mr.R.Murugesan, Adv.

Advocate for Pet/Ap. : Mr.T.R.Rajagopal, Adv

Judgement :

Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 24.08.1998 in A.S.No.104 of 1997 passed by the Learned Subordinate Judge, Tiruvannamalai, in reversing the Judgment and Decree dated 30.09.1997 in O.S.No.555 of 1987 passed by the Learned II Additional District Munsif, Tiruvannamalai.

JUDGMENT

1. The Appellant/1st Respondent/Plaintiff has filed the present Second Appeal as against the Judgment and Decree dated 24.08.1998 in A.S.No.104 of 1997 passed by the Learned Subordinate Judge, Thiruvannamalai, in reversing the Judgment and Decree dated 30.09.1997 in O.S.No.555 of 1987 passed by the Learned II Additional District Munsif, Thiruvannamalai.

2. The Resume of Plaint Facts (filed by the Appellant/ Plaintiff):

The Plaint Schedule property and other properties belonged to the 3rd Respondent/1st Defendant. The 3rd Respondent/1st Defendant for himself and for 1st Respondent/2nd Defendant and 2nd Respondent/ 3rd Defendant minor sons Kuppusamy and Viji as guardian, has sold the property by means of Sale Deed, dated 21.01.1986, for a sale consideration of Rs.900/-. The Appellant/Plaintiff is the absolute Landlord. The property purchased by the Appellant/Plaintiff has been encroached upon by the 3rd Respondent/1st Defendant with the connivance of the 1st Respondent/2nd Defendant and in the suit property, they have put up a fence.

3. Coming to know about the encroachment, the Appellant/ Plaintiff has caused a Lawyer's notice, dated 01.07.1987, to the 1st Respondent/2nd Defendant and the 2nd Respondent/3rd Defendant. The 1st Respondent/2nd Defendant and the 2nd Respondent/3rd Defendant have caused a reply dated 10.07.1987, but, they have not removed the encroachment. The suit has been filed for declaration that the Appellant/Plaintiff is the owner of the suit property absolutely and for recovery of possession through Court. Also, the Appellant/Plaintiff has sought the relief of mesne profits as per Order 20 Rule 12 of Civil Procedure Code from the date of filing of the suit till date of possession.

4. The 3rd Respondent/1st Defendant has been set Ex parte before the trial Court.

5. The Written Statement pleas of the 1st Respondent/2nd Defendant (adopted by the 2nd Respondent/3rd Defendant):

The suit is liable to be dismissed. It is false to state that the 1st Respondent/2nd Defendant has encroached upon the suit property by putting up the fence. There is no necessity or compulsion for the 1st Respondent/2nd Defendant to encroach

upon the property. The Appellant/Plaintiff has filed the suit on wrong impression that the property purchased by the 1st Respondent/2nd Defendant and the suit schedule property are one and the same.

6. The 1st Respondent/2nd Defendant has purchased 11 cents out of 0.68 cents in Punja Survey No.44/3B of Chettipattu Village from the 3rd Respondent/1st Defendant for a valuable sale consideration by means of registered Sale Deed dated 27.08.1986 (along with other properties being purchased) and has been in possession and enjoyment of the same. The 1st Respondent/2nd Defendant by putting up the fence in 0.11 cents as stated supra has been in enjoyment of the same. His action cannot be stifled. Also, no right can be claimed by anyone as per Law.

7. The total extent in S.No.44/3B is 0.68 cents. The said property and other properties belonged to one Kutti Konar, who executed a registered Will on 21.07.1980 to and in favour of the 3rd Respondent/ 1st Defendant without any compulsion and in a sound state of mind. As per Will in S.No.44/3B, the 3rd Respondent/1st Defendant is to get 64 = cents out of 0.68 cents along with other properties. The said Kutti has expired and after his demise, the 3rd Respondent/1st Defendant is in enjoyment of the properties. The Appellant/Plaintiff is to locate the property which he has purchased by means of Sale Deed. As such, he cannot claim any right and title in the property purchased by the 2nd Respondent/3rd Defendant.

8. The Appellant/Plaintiff has not furnished specific identifications, location etc, and the suit filed by him based on vague property details is liable to be dismissed.

9. The Appellant/Plaintiff has not mentioned the period of encroachment made by the Respondents/Defendants in the notice as well as in the suit. The cause of action alleged in the Plaint dated 30.06.1987 is an imaginary one. The Appellant/Plaintiff is not entitled to obtain any relief.

10. Before the trial Court, on behalf of the Appellant/Plaintiff, in the main suit, 1 to 6 Issues have been framed for adjudication. On the side of the Appellant/Plaintiff, Witnesses PW1 to PW3 have been marked and Ex.A.1 to Ex.A.7 have been

marked. On the side of the Respondents/Defendants, Witness DW1 has been marked and Ex.B.1 has been marked. On behalf of the Court, Ex.C.1 to Ex.C.4 have been marked.

11. The trial Court, on an appreciation of the available oral and documentary evidence on record, has come to a resultant conclusion that as located by the Advocate/Commissioner, the suit schedule property details and Ex.A.1 Sale Deed dated 21.01.1986 property schedule have been encroached upon by the 1 and 2 Respondents/2 and 3 Defendants in the property belonging to the Appellant/Plaintiff and granted the relief of declaration that the Appellant/Plaintiff is an absolute owner of the suit property. Further, it granted mesne profits relief as per Order 20 Rule 12 of the Civil Procedure Code and passed a Decree to that effect.

12. Being dissatisfied with the Judgment and Decree of the Learned II Additional District Munsif, Tiruvannamalai, dated 30.09.1997 in O.S.No.555 of 1987, the 1 and 2 Respondents/2 and 3 Defendants as aggrieved persons, have filed A.S.No.104 of 1997 on the file of the Learned Subordinate Judge, Tiruvannamalai.

13. The Learned Subordinate Judge, Tiruvannamalai, while passing the Judgment in A.S.No.104 of 1997 on 24.08.1998, has among other things held that 'PW3 (1st Defendant) has sold his house and the land surrounding the house to the 2nd Respondent/3rd Defendant and that the house has been demolished by the 1 and 2 Respondents/2 and 3 Defendants and it is quite evident that the land has been purchased by the Appellant/Plaintiff from the Defendant is Survey No.62/7 as seen from the documentary and oral evidence and Consequently, allowed the Appeal by setting aside the Judgment and Decree of the trial Court dated 30.09.1997 in O.S.No.555 of 1987, by awarding costs of the trial Court as well as the First Appellate Court.

14. Before this Court, the Appellant/Plaintiff being aggrieved against the Judgment and Decree of the First Appellate Court in A.S.No.104 of 1997, dated 24.08.1998, has preferred the instant Second Appeal before this Court.

15. At the time of admission of the Second Appeal, this Court has formulated the following Substantial Question of Law for determination.

Is the Learned Subordinate Judge right in reversing the Judgment and Decree of the trial Court when the boundaries tally with the report of the Commissioner coupled with the admission of the vendor as PW3 to the effect the suit property alone was sold to Plaintiff.?

16. The Contentions, Discussions and Findings on Substantial Question of Law:

The Learned Senior Counsel for the Appellant/Plaintiff submits that the First Appellate Court has erroneously cast the onus of proof on the Appellant/Plaintiff and further, it has not take into account of the fact that the boundaries will prevail over the survey number and area, if there is any conflict between them.

17. The Learned Senior Counsel for the Appellant/Plaintiff urges before this Court that the property lying to the North of Thandrapattu Road along with specific boundaries have been alienated in favour of the Appellant/Plaintiff as per Ex.A.1 Sale Deed dated 21.01.1986.

18. Advancing his arguments, it is the submission of the Learned Senior Counsel for the Appellant/Plaintiff that the suit property has been properly identified by the Appellant/Plaintiff, which is corroborated by the Advocate/Commissioner's Report.

19. The stand of the Appellant/Plaintiff is that DW1 and DW2 have admitted that the property that has been alienated to the 2nd Respondent/3rd Defendant is lying to the North of the suit property and also that, the report of the Advocate/Commissioner will strengthen the case of the Appellant/Plaintiff that 1 and 2 Respondents/2 and 3 Defendants have encroached upon the suit property especially in the portion marked 'E', 'F', 'G', 'H'.

20. According to the Learned Senior Counsel for the Appellant/Plaintiff, the boundary recitals mentioned in Ex.A.7 Sale Deed dated 27.08.1986 are false because of the fact that the property mentioned in Ex.A.7 Sale Deed is lying to the North of the suit property. However, these crucial aspects of the matter have not been borne in mind by the First Appellate Court, while deciding A.S.No.104 of

1997.

21. Finally, the Learned Senior Counsel for the Appellant/Plaintiff projects an argument that the Respondents/Defendants have not produced vital documents in their possession which has not been taken note of by the First Appellate Court. Moreover, the said Court has incorrectly reversed the well considered reasoning of the trial Court on flimsy grounds.

22. Per contra, it is the submission of the Learned Counsel for the 1 and 2 Respondents/2 and 3 Defendants that the First Appellate Court has come to a definite finding that the Appellant/Plaintiff has purchased from the Defendant the land in Survey No.62/7 and further that the Defendant has purchased 'L' shape portion of land on the Northern side of the Survey No.62/5 and has rightly allowed the Appeal by setting aside the Judgment and Decree of the trial Court in O.S.No.555 of 1987 dated 30.09.1997 which need not be interfered with by this Court sitting in Second Appeal.

23. The evidence of witnesses PW1 to PW3, D.W.1 coupled with the documentary evidence available on record are referred to by this Court for fuller and better appreciation of the disputes/ controversies between the parties.

24. The evidence of PW1 (Appellant/Plaintiff) is that the 3rd Respondent/1st Defendant has sold the suit property to him as per Ex.A.1 Sale Deed dated 21.01.1986 and that the 1st Respondent/2nd Defendant is the brother of the 3rd Respondent/1st Defendant and the 2nd Respondent/3rd Defendant is the wife of the 1st Respondent/2nd Defendant and in Survey No.44/3 of Melchettipattu Village, 0.68 cents belonged to his father Appakutti Konar and the said Appakutti Konar on 21.07.1980 to the 3rd Respondent/1st Defendant has executed the Will and settled 64 = cents of land and that the 3rd Respondent/1st Defendant and the 1st Respondent/2nd Defendants's father has expired.

25. It is the further evidence of P.W.1 that from the 3rd Respondent/1st Defendant, he purchased 10 cents out of 64 = cents by putting four boundaries as per Ex.A.1 Sale Deed dated 21.01.1986 and that he has purchased the 10 cents for constructing a house and at the time of his construction of house, the 1st

Respondent/2nd Defendant has picked up a quarrel/trouble with him and the balance 54 cents has been purchased in the name of the 2nd Respondent/3rd Defendant by the 1st Respondent/2nd Defendant and that the sale in favour of the 2nd Respondent/3rd Defendant has taken place on 27.08.1986 and therefore, there is no remaining portion of land to the 3rd Respondent/1st Defendant.

26. The evidence of PW1 proceeds to the effect that again the 1st Respondent/2nd Defendant has purchased from the 3rd Respondent/1st Defendant the 10 cents of land sold to him as 11 cents by mentioning different four boundaries on 27.08.1986 and since he has not been there on 30.06.1986, the land has been annexed and cultivated.

27. PW1 (in his cross examination) has deposed that the property mentioned in Ex.A.1 Sale Deed and the suit schedule property are one and the same and that after purchase of land in his name, he has not changed the Survey Number and the patta. Further, the Respondent/ Defendant obstructed him, while proceeding to his land.

28. PW2 in his evidence has deposed that he has been appointed as an Advocate Commissioner to locate the suit property and that he has visited the suit property on 28.10.1990 at about 10.00 AM along with the Surveyor and the Surveyor informed him that Survey No.44/3B has been changed as Survey No.62/5 and he has marked the Survey No.62/5 in his Plan and that he has filed the Surveyor Plan and 'A' Register Copy and also, he has filed the new Plan.

29. PW2 has further deposed that he has located the suit property and that he has shown Survey No.62/5 in the Plan and he has projected the suit place by mentioning the four boundaries.

30. PW3 (1st Defendant) in his evidence has deposed that he has sold the property to the Appellant/Plaintiff and in Melchettipattu Village, there are self-acquired lands purchased by his father and his elder brother's portion has been sold to Swaminathan and his father has partitioned the property orally and has gone to a different Village and his brother Murugesan has two wives and that one wife has expired and he has two male children and that Murugesan's portion has

been returned in favour of Narayanasamy and Velayutham.

31. PW3 in his cross examination has deposed that in Survey No.44/3, out of 68 cents, in the middle portion he has right of 10 cents and in Ex.A.1-Sale Deed, the existence of house has not been mentioned and that since the house has been dilapidated, it has not been mentioned and also that he has not gone to the suit property and he does not know who are all enjoying the properties in the said Survey Number and further that he has sold only the 10 cents which he obtained by way of Will executed by his father.

32. DW1 (2nd Defendant) in his evidence has deposed that the 3rd Defendant is his wife and in Old Survey No.44/3B, out of 68 cents, 64 = cents belonged to Kutti Konar and that 64 = cents have been obtained by the 3rd Respondent/1st Defendant as per Will dated 21.07.1980 and that the said Kutti has expired and after his death, his brother is in enjoyment of 64 cents and he has sold to his wife the 11 cents by means of Ex.B.1 Sale Deed dated 27.08.1986 and that the original Sale Deed has not been found and after purchase, they are only in enjoyment of the property and the 10 cents of land namely the suit property that is the Northern portion of the suit property 11 cents has been purchased for which four boundaries have been described. In Ex.A1-Sale Deed, the Survey Number is mentioned as 62/7 and the place he has purchased is Survey No.62/5 and for writing of Ex.B.1 Sale Deed dated 27.08.1986, the four boundaries have been mentioned by the 3rd Respondent/1st Defendant.

33. It is the evidence of DW1 that he is not enjoying the portion of land of Vadivel in Survey No.44/3 and in Survey No.44/3B, out of 64 cents, there is no land other than 11 cents and apart from the 11 cents, either himself or his wife has not purchased any property and the mentioned Survey No.62/5 and 62/7 based on four boundaries and that he is the last purchaser and he does not know to whom the properties have been sold and that the Commissioner's Plan has been given by the Deputy Tahsildar.

34. Ex.A.1 is the registered Sale Deed dated 21.01.1986 in favour of the Appellant/Plaintiff executed by the 3rd Respondent/1st Defendant for himself and on behalf of his minor sons Kuppusamy and Viji in respect of 10 cents in Survey

No.44/3B, out of 0.68 cents at Melchettipattu Village. In Ex.A.1 Sale Deed dated 21.01.1986, two witnesses have signed and that the documents has been written by the scribe whose name is not decipherable.

35. In Ex.A.2 the Appellant/Plaintiff lawyer's notice dated 01.07.1987 addressed to the 1st Respondent/2nd Defendant and the 2nd Respondent/3rd Defendant, it is among other things mentioned that the Appellant/Plaintiff has purchased the property mentioned in Ex.A.1 Sale Deed dated 21.01.1986 from the 3rd Respondent/1st Defendant (for himself and on behalf of his two minor sons) and Ex.A.1 Sale Deed, property is said to have been purchased by the 2nd Respondent/3rd Defendant and has put up a wire fencing by encroaching upon the same. Further, it is also mentioned that after a portion of the property has been sold to the Appellant/Plaintiff, again the same property cannot be sold because of the fact that no right, title and interest has been accrued and also, the 1 and 2 Respondents/2 and 3 Defendants have been directed to vacate from the schedule property.

36. In Ex.A.5 Reply Lawyer's notice dated 10.07.1987 issued on behalf of the 1st Respondent/2nd Defendant and the 2nd Respondent/3rd Defendant, addressed to the Appellant/Plaintiff's Lawyer, it is stated that the schedule of property mentioned in Ex.A.2 notice dated 01.07.1987 has no connection with the 'L' shape property of 11 cents, purchased by the 2nd Respondent/3rd Defendant for a valuable sale consideration.

37. In Ex.A.6 is the certified copy of the Will dated 21.07.1980 executed by Kutti, to and in favour of the 3rd Respondent/1st Defendant in respect of the Punja Survey No.44/1A out of 1 acre and 0.2 cents. 0.66 cents in common, Punja Survey No.44/3A, out of 0.67 cents, = share 0.33 = cents in common etc and also in respect of the suit property 44/3B out of 0.68 cents, 0.64 = cents in common.

38. Ex.A.7 is the certified copy of the registered Sale Deed dated 27.08.1986 executed by the 3rd Respondent/1st Defendant (for himself and on behalf of his two minor sons), to and in favour of the 2nd Respondent/3rd Defendant in respect of 11 cents in Survey No.44/3B, out of 0.68 cents.

39. Ex.B.1 is the Sale Deed dated 27.08.1986 executed by the 3rd Respondent/1st Defendant (for himself and on behalf of his two minor sons) to and in favour of the 2nd Respondent/3rd Defendant, in respect of the other properties, inclusive of 11 cents Punja land in Survey No.44/3 of Melchettipattu Village.

40. In Ex.C.1 Advocate Commissioner's report, it is mentioned that the Commissioner has inspected the suit property on 28.10.1990 at 10.00 AM along with the Surveyor and also has looked into the concerned documents and has come to know that the suit property Survey No.44/3B, 0.10 cents has been changed as Survey No.62/5, 0.04.5 Hectares. Again, the Advocate/Commissioner has inspected the suit property on 21.07.1991 at about 10.00 AM (after issuance of prior notice) and with the help of Surveyor, the suit has been identified and that the extent in Old Survey No.44/3B and the extent in Resurvey No.62/5 has been changed/alterd and 'A' Register copy has been filed along with the report and that 'DEFGHI' portion is the suit property. Moreover, the portion shows in Plan 'A' is 4 feet low to that of portion mentioned in 'C' and also, 'A' portion is seen as a ploughed one.

41. In Ex.C.3 'A' Register Copy of 40, Melchettipapttu Village (issued by the Deputy Tahsildar, Tiruvannamalai, dated 06.03.1991), it is mentioned that for Old Survey No.44/3B, New Survey Number is 62/5 and classified as Punja.

42. The trial Court in its Judgment in the main suit in Para 11 has inter alia observed that PW3 in his evidence has categorically stated that he has sold the property mentioned in the suit schedule with four boundaries and further, he has retained the Northern portion for himself (apart from the portions sold in Ex.A.1 Sale Deed)) and also that the house in the suit property has been demolished is the coinciding with the Commissioner's mentioning that as per Government records, the house has been demolished. Further, the trial Court has gone to the extent of observing that even though on the side of the Respondents/Defendants, it is stated that the Survey Number is different, the property has been located by the Advocate/Commissioner and that the suit schedule property details and Ex.A.1 property details are coinciding and 1 and 2 Respondents/2 and 3 Defendants have encroached upon the property belonging to the Appellant/Plaintiff.

43. At this stage, this Court pertinently points out that the location of the property is one aspect of the matter. The other aspect is the tracing of title/establishment of title by the Appellant/Plaintiff. On going through the Judgment of the trial Court in the main suit in O.S.No.555 of 1987 dated 30.09.1997, this Court is of the considered view that the trial Court has not rendered a definite/specific/ categorical finding that 1 and 2 Respondents/2 and 3 Defendants have encroached upon the suit property belonging to the Appellant/Plaintiff and in this regard, the trial Court Judgment in the suit in O.S.No.555 of 1987, dated 30.09.1997, suffers from patent error which requires interference in the hands of this Court.

44. At this stage, this Court relevantly points out that in the decision in (2006) 6 Andra Law Digest page 751 at page 757 (Andra Pradesh), wherein it is held that 'only omni bus issues framed by the First Appellate Court Judgment does not conform to the requirement of law and hence, the case has been remanded.'

45. In this connection, this Court quotes the decision in Lakhan Lall Poddar v. Bhagarthi Bhagat, AIR 2007 (NOC) 1838 (JHAR), wherein it is observed that 'the Appellate Court proceeded to decide only one issue as important issue i.e. whether plaintiff has acquired valid right, title and possession over suit property on the basis of registered sale deed and other oral and documentary evidences adduced by parties were not discussed nor reasoning given by trial Court and it is held that the First Appellate Court has failed to discharge its mandatory obligation specially while reversing the judgment of trial Court and that the judgment cannot be sustained in law and further, the matter has been remanded back to First Appellate Court for deciding the appeal afresh.'

46. It cannot be gainsaid that it must be evident from the Judgment that the Court has properly appreciated the case, applied its mind and decided on considering the evidence on record.

47. It is to be remembered that discussion of every part of evidence in Appellate judgment is imperative. In fact, the Appellate Court Judgment must cover all important controversies/disputes involved in the subject matter in issue, as opined by this Court.

48. Moreover, the First Appellate Court should formulate points for its consideration and to proceed with disposal of appeal and ought to apply its mind and assign reasons independently for arriving at the conclusions.

49. As regards the First Appellate Court in A.S.No.104 of 1997, dated 24.08.1988 is concerned, this Court points out that the First Appellate Court has framed an Omni Bus point/wholesale point for consideration, which is in utter disregard to the ingredients of Order 41 Rule 31 of Civil Procedure Code. As a matter of fact, the ingredients of Order 41 Rule 31 of Civil Procedure Code are explicit, mandatory and admits of no exception. Indeed, the First Appellate Court, in its Judgment in Appeal, shall state the points for determination as per Order 41 Rule 31(a) of Civil Procedure Code. In a case open to an Appeal a Court of Law is to render/record its findings on all important points for consideration, so as to avoid a remand. In case, the Court of Appeal disagrees with any of the findings, rendered by the trial Court.

50. One cannot lose sight of a vital fact that Order 41 Rule 31 of Civil Procedure Code enjoins an obligation on the First Appellate Court to mention the points for determination, the decision thereon, the reasons for the decision etc. In the instant case on hand, the Judgment of the First Appellate Court in A.S.No.104 of 1997 does not deal with the evidence of PW1 to PW3 and DW1 in details. Also that the Surveyor, who aided the Advocate/Commissioner in locating the suit property/place has not been examined as witness on behalf of the Appellant/Plaintiff before the trial Court. Since the Advocate Commissioner is said to have identified the suit property with the help of Surveyor, this Court opines that the Surveyor ought to have been examined as a Witness before the trial Court.

51. In Ex.B.1 Sale Deed dated 27.08.1986 executed in favour of the 2nd Respondent/3rd Defendant by the 3rd Respondent/1st Defendant (for himself and his minor sons) the suit property is mentioned as Survey No.44/3B, 0.11 cents of Punja land. But, in Ex.A.1 Sale Deed executed in favour of the Appellant/Plaintiff by the 3rd Respondent/1st Defendant, it is mentioned as Survey No.44/3B, 10 cents out of 0.68 cents at Melchettipattu Village. The First Appellate Court in its Judgment in A.S.No.104 of 1997 at Para 15 has inter alia observed that as far as

the present case is concerned, although the sub-division number are not proper, the four boundaries are property and as such, the decision Mahalingam v. A.S.Narayanaswamy Iyer and others, 1996-1-L.W.443, will not apply and therefore, it has decided to allow the Appeal and answered in favour of the 1 and 2 Respondents/2 and 3 Defendants and allowed the Appeal, by setting aside the Judgment and Decree of the trial Court passed in the main suit.

52. In view of the fact that the Appellate Court has framed only an Omni Bus point for determination in Appeal namely whether the Appeal is to be allowed? and the same is not in accordance with the Order 41 Rule 31 of the Civil Procedure Code, this Court opines that the First Appellate Court has not borne in mind the ingredients of Order 41 Rule 31 of Civil Procedure Code and therefore, the Judgment and Decree of the First Appellate Court requires interference in the hands of this Court, in the interest of Justice.

53. Earlier, this Court has held that even though the trial Court has observed in its Judgment in the main suit that the Advocate/ Commissioner has located the suit as 'DEFGHI', the tracing of title in respect of the suit property, no categorical finding has been rendered by the trial Court which is a defect based on the facts/evidence adduced by the parties. The trial Court as per Order 20 Rule 5 of Civil Procedure Code is to state its decision on each issue by expressing cogent reasons. The final conclusion in a Judgment of a Court of Law must exhibit that Judge has applied his mind conscientiously. In appealable cases, the trial Court must decide all questions in fact which arise on the issues to avoid a remand as per decision Jaganath Rao v. Rambharosa, 60 IA 49.

54. This Court worth recalls the decision in Mahalingam v. A.S.Narayanaswamy Iyer and others, 1996-1-L.W.443, in Page 444 at Para 13, it is observed as follows:

The question to be decided is what was the intention of the Testatrix when she bequeathed two properties in favour of the first defendant under the Will. If the testatrix had intended only to give a very small extent of 5 cents, there was no necessity for her to mention the total extent of the survey number as such. According to the plaintiff, the boundaries given in the description did not pertain to the survey number and the boundaries related only to the extent of 5 cents. If that

is so, the Testatrix would have mentioned only the extent of 5 cents and left it there. But, instead, she had taken care to say that the second item of property comprised a total extent of 68 cents. That itself shows that she laid emphasis on the extent of land given by her and she had also mentioned the Survey Number 145/2C though, it is, admittedly, by mistake, shown as 145/26 in the Will.

Also, in Para 17, it is observed hereunder:

The courts below failed to note that the intention of the testatrix should be ascertained for the purpose of deciding the dispute in the suit. Instead, the courts below have proceeded as if the only question is whether boundaries will prevail or the extent would prevail. The judgments of the courts below are clearly vitiated in as much as they have failed to keep in mind the real test to be applied in this case for deciding the controversy between the parties.

55. Inasmuch as the trial Court has not rendered a specific/categorical finding as to the establishment of title to the property and also, since the First Appellate Court Judgment in A.S.No.104 of 1997 is not in conformity with the ingredients of Order 41 Rule 31 of Civil Procedure Code because of the fact that the Appellate Court has not dealt with the evidence of PW1 to PW3 and DW1 in detail coupled with the exhibits filed on both sides, this Court comes to an inevitable conclusion that the evidence available on record is insufficient for this Court to come to a definite conclusion to decide the subject matter of controversies between the parties. Therefore with a view to provide an opportunity to both parties, to prevent an aberration of Justice, this Court remits the entire subject matter on issue to the trial Court for fresh consideration, by setting aside both the Judgments and Decrees of the trial Court in the main Suit as well as the First Appellate Court in the First Appeal, to promote substantial cause of Justice. As such, this Court is not answering the Substantial Question of Law and leaves it open. Consequently, the Second Appeal succeeds.

56. In the result, the Second Appeal is allowed, leaving the parties to bear their own costs. Consequently, the Judgment and Decree dated 30.09.1997 in O.S.No.555 of 1987 passed by the Learned II Additional District Munsif, Tiruvannamalai as well as the Judgment and Decree dated 24.08.1998 in

A.S.No.104 of 1997 passed by the Learned Subordinate Judge, Tiruvannamalai, are set aside in furtherance of substantial cause of Justice. The entire subject matter of the controversies between the parties are remitted back to the trial Court for fresh decision/determination in accordance with law. It is open to the parties to let in additional oral and documentary evidence by examining additional witnesses if they so desire/advised. The Appellant/Plaintiff is directed to examine the Surveyor, who has given the Plan and in case the Surveyor is not examined on the side of the Appellant/Plaintiff, this Court holds that it is open to the trial Court to examine the Surveyor as a Court Witness to arrive at the truth of the matter. It is open to the parties to cross examine the Surveyor in accordance with law. Since the suit is of the year 1987, the trial Court is directed to dispose of the suit within a period of four months from the date of receipt of a copy of this Judgment and to report compliance to this Court without fail.

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