

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.177 of 2007

Judgment reserved on 08.07.2015	Judgment pronounced on 20.07.2015
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Meharrunnissa

...Appellant/1st Respondent/Plaintiff

Vs

1. Esther Rani (Died) ...Respondent/Appellant/1st Defendant

2. Dadasha Makka Durgha Trust,
Rep. by its Managing Trustee
Syed Munavar Hussain (deceased)
No.13, Vali Hussain Saheb Street,
Dadarsh Makkan, Perambur
Chennai - 600 013.
(Suit against this
respondent is abated) ...Respondent/2nd Respondent/ 2nd Defendant

3.Rajasekar

4.Vijaysekar

...Respondents

(R3 & R4 brought on record as LRs
of the deceased R1 as per order
dated 25.02.2013 made in M.P.
Nos.1 & 2 of 2012)

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 10.01.2006 in A.S.No.39 of 2001 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Chennai-1 reversing the Judgment and Decree dated 19.12.2000 in O.S.No.5432 of 1986 on the file of the IX Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Shaji Paul

For Respondents

R3 & R4 : Mr.Inamdar Ameenus Rahman

R1 : Died (Steps Taken)

R2 : Given up

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 10.01.2006 in A.S.No.39 of 2001 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Chennai-1 reversing the Judgment and Decree dated 19.12.2000 in O.S.No.5432 of 1986 on the file of the IX Assistant Judge, City Civil Court, Chennai.

2.The appellant as a plaintiff filed a suit for declaration that the two properties, namely, the property belonging to the plaintiff purchased by her on 19.11.1970 was demolished and reconstructed under a duly sanctioned plan and described in Schedule 'A' and the property belonging to the defendant purchased by her under a mortgage cum sale in 1954 in respect of which a decree for possession has been granted in O.S.No.4847 of 1970 and described in Schedule 'B' and now not in existence are totally and entirely different and they cannot be equated with and identified with one another and also permanent injunction restraining the defendant from dispossessing the plaintiff from 'A' Schedule property under the guise of execution proceedings in O.S.No.4840 of 1970 stating that the first defendant as a plaintiff filed a suit in O.S.No.4847 of 1970 for declaration that she is the lessee under the second defendant and recovery of possession from the defendants 2 to 6 therein. In the said suit, the appellant/plaintiff is the 6th defendant. The first defendant would submit that the second defendant in the suit, namely, Durairaj, who is the tenant under her, during the pendency of the suit, has sold the property to the third defendant in the suit. The third defendant sold the same to the fourth defendant and the fourth defendant in turn sold the same to the fifth defendant, from whom, the sixth defendant/the appellant herein has purchased the property. The Trial Court after considering the same has decreed the suit. Against which, the appellant/plaintiff has preferred an appeal and that has been dismissed. Aggrieved by that, second appeal has been preferred by the appellant, which was also dismissed. Then, the first defendant filed Execution Petition and delivery has been ordered. At that time, the plaintiff/appellant has come forward with the present

suit stating that the property mentioned in O.S.No.4847 of 1970 is different from the present suit property. Resisting the same, the respondents/defendants filed individual written statement and prayed for dismissal of the suit.

3.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, Exs.A1 to A22 and Exs.B1 to B13 and decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendants preferred an appeal in A.S.No.39 of 2001 on the file of the Additional District and Sessions Court, Fast Track Court No.III, Chennai.

4.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal by holding that the suit is barred by resjudicata and in the earlier suit itself it was substantially decided and the suit properties are one and the same and so, the plaintiff is not entitled to any relief. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the plaintiff.

5.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"Whether the learned District Judge was correct in finding that the suit is barred by Principles of Resjudicata?

6.Challenging the judgment and decree of the First Appellate Court, the learned counsel appearing for the appellant would submit that the suit is not hit by resjudicata for the reason that the issue has not been substantially decided. He would also submit that the first respondent herein has not get into the box in the present suit and in the earlier suit also one Govindasamy was examined before the Court in O.S.No.4847 of 1970. That factum was not considered by the First Appellate Court. He further submitted that the first appeal itself is not maintainable because the value of the property is below Rs.10,000/- as per Section 96(4) CPC. For the said proposition, he relied upon the decisions reported in 2014 (213) DLT 594 (Bhagwati Prasad Sharma vs. Pt.Ram Sarup Sharma (Deceased)) and AIR 2003 BOMBAY 325 (Motiram Yeshwant Gaikwad vs. Sou.Akkatai Uttam Trimukhe). Further to substantiate his argument that the suit is not hit by resjudicata, he relied upon the decision reported in AIR 2000 SC 1238 (Sajjadanashin Sayed Md. B.E. Edr. (D) by LR. vs. Musa Dadabhai

Ummer and others). He further submitted that the first respondent herein has played fraud upon the Court and obtained the decree and so, it is nonest in the eye of law. For the said proposition, he relied upon the decision reported in 2007 (4) SCC 221 (A.V.Papayya Sastry vs. Government of Andhra Pradesh). He would further submit that the appellant purchased the property from Umeeda Begum and she demolished the old superstructure and put up a new one. That factum was not not considered by the First Appellate Court. Hence, he prayed for setting aside the judgment and decree of the First Appellate Court.

7. Resisting the same, the learned counsel appearing for the respondents 3 and 4 would submit that the suit itself is hit by resjudicata for the reason that the suit property in the present suit as well as in the suit in O.S.No.4847 of 1970 are one and the same, that has been evidenced by Ex.B3, plaint in O.S.No.4847 of 1970, in which the present appellant is the sixth defendant, who is a subsequent purchaser. Written statement filed by the appellant herein was marked as Ex.B4. The judgment and decree passed in O.S.No.4847 of 1970 has been confirmed under Ex.B7 in A.S.No.1 of 1974 and that has been confirmed under Ex.B1 in S.A.No.143 of 1976. Execution Petition has been filed and possession has been taken partly. But the present suit has been filed with a view to prevent the first respondent from enjoying the fruits of the decree. Hence he prays for dismissal of the appeal.

8. Considered the rival submissions made on both sides and perused the material records and both oral and documentary evidence.

9. The only point to be decided is whether the present suit is hit by resjudicata. Even though the learned counsel appearing for the appellant has not raised the plea that the first appeal is not maintainable when the first appeal has been preferred by the first respondent against the judgment and decree passed in O.S.No.5432 of 1986 i.e. A.S.No.39 of 2001, now without raising in grounds in memorandum of appeal, he raised the plea at the time of argument that the first appeal is not maintainable as per Section 96 (4) CPC. It is appropriate to incorporate Section 96(4) CPC, which is as follows:

96. Appeal from Original Decree:-

(1).....

(2).....

(3).....

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten

thousand rupees.

10. It is true that the value of the suit is below Rs.10,000/- and unless question of law arise, no appeal will lie. At this juncture, it is appropriate to consider the decision relied upon by the learned counsel appearing for the appellant reported in AIR 2003 Bombay 325 (Motiram yeshwant Gaikwad vs. Sou.Akkatai Uttam Trimukhe), wherein it was held that no appeal shall lie where recovery claim is less than Rs.10,000/-. It is appropriate to incorporate paragraph Nos.6 and 7, which reads as follows:

"6. Plain reading of Section 96(4) of the Civil Procedure Code would show that the appeal lies against the decree in a suit even where the amount of valuation of the subject matter of the suit does not exceed to Rs. 10,000/-, on a question of law, though the question of facts are not permissible to be agitated in such appeal. This does not mean that parties are left with no remedy against a decree passed by the trial Court in a case where the value does not exceed to Rs. 10,000/-. It should not be forgotten that right of appeal is not an inherent right, but it is essentially a creature of statute. Unless the statute gives the right of appeal, the same does not exist. At the same time, it can not be disputed that once such right is conferred by a statute, it becomes a vested right; however, the same can always be subjected to conditions which may be imposed by the Legislature, in which case a party would not be entitled to exercise such right without fulfillment of those conditions. Bearing in mind this well settled principles of law, if one peruses Sub-section (4) of Section 96 quoted above, it is apparent that the same comprises of two conditions relating to the exercise of right of appeal against a decree passed by the Civil Court. The first condition is that, for the purpose of regular appeal against a decree, the valuation of the suit has to exceed Rs. 10,000/-. Otherwise, the second condition is that, the interference by the appellate Court can only be on the point of law and not otherwise. Therefore, the contention that the petitioner has no right of appeal, cannot be accepted.

7. Section 96(4) only regulates the right of appeal by restricting the exercise thereof in case where the value of the suit does not exceed Rs. 10,000/-. That does not mean that the right of appeal is taken away by the said provision of law. Under the said provision of

law, merely the appellate Court's interference has been regulated and restricted to the question of law in specified cases, i.e.
where the valuation does not exceed to Rs. 10,000/-."

11.The said proposition has been followed by the Delhi High Court in the decision reported in 2014 (213) DLT 594 (Bhagwati Prasad Sharma vs. Pt.Ram Sarup Sharma (Deceased). It is appropriate to incorporate paragraph Nos.4 and 5, which reads as follows:

"4.I do not agree with the impugned judgment or with the arguments urged on behalf of the respondent/defendant that no appeal lies inasmuch as sub-Section (4) states that appeal will lie but only on a question of law. If according to the first appellate court, a question of law does not arise then after discussing the merits of the case and holding that because of the conclusions as regards merits of the case as per the judgment of the trial court no substantial question of law arises, then possibly the appeal may be dismissed on merits, but not that appeal does not lie under Section 96 sub- Section (4) CPC.

5.Learned counsel for the respondent sought to place reliance on the judgment of the learned Single Judge of the Bombay High Court in the case of Motiram Yeshwant Gaikwad vs. Akkatai Uttam Trimukhe AIR 2003 Bombay 325 that no appeal lies where recovery claimed is less than Rs.10,000/-. However, this judgment goes against the respondent/defendant, because it holds that a first appeal lies but only on a question of law."

12.Both the above citations are not applicable to the facts of the present case because Section 96(4) CPC itself clearly states that if any question of law involved, the appeal is maintainable. Even though the value of the suit is below Rs.10,000/- the first respondent herein raised the plea of resjudicata and that has been went against her. Hence, she preferred this second appeal. In such circumstances, I am of the view that the first appeal is maintainable. Furthermore, the appellant herein who lost the battle in the first appeal has not raised his little finger while arguing before the Lower Appellate Court that the first appeal is not maintainable. But she kept quite all along and now, she raised the same. Even then I am of the opinion that the first appeal involved the question of law and hence the first appeal is maintainable as per Section 96(4) CPC.

13.The learned counsel appearing for the appellant further relied upon the decision reported in 2007 (4) SCC 221 (A.V.Papayya Sastry vs. Government of Andhra Pradesh) and submit that the first respondent has played fraud upon the Court and obtained the decree. It is appropriate to incorporate paragraph No.22, which reads as follows:

"22.It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings."

But in the plaint, the appellant/plaintiff has not averred that the decreed passed in O.S.No.4847 of 1970 was obtained by fraud. She has not filed a suit for setting aside the decree in O.S.No.4847 of 1970 on the ground of fraud. In such circumstances, I am of the view that the above citation is not applicable to the facts of the present case.

14.Now, the only point to be decided is whether the suit is hit by resjudicata? It is appropriate to incorporate Section 11 CPC, which is as follows:

11.Res judicata.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the

other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

15.The description of the property in the present suit in O.S.No.5432 of 1986 as well as in the earlier suit in O.S.No.4847 of 1970 are as follows:
O.S.No.5432 of 1986

Schedule 'A'

Present patta superstructure with stone and cement wall, formerly thatched hut with thin sheet fencing, demolished and reconstructed under a duly sanctioned plan bearing Old door No.37-A, Strahans Road, (present door No.15) 3rd lane, Purasawalkam, Sub District and madras District bounded on the east by Marim Bi Bi's house, west by Strahans Road 3rd lane, Norther by Sulaiman Sahib's house and South by Rathnavelu Pillai's house, measuring East to West on the northern side 31 feet East to West on the southern side 35 feet, 1½ " north to south on the Eastern side 44 feet and north to south on the western side 36 feet (in all 1323 sq.ft.) bearing O.S.No.2653 , R.S.281 and C.C.No.1270, Corporation Division No.27.

Schedule 'B'

All that piece and parcel of land and small superstructure brick wall country tiled roof, bearing Old Door No.3-A, present door No.37-A, new door NO.15, 3rd lane, Strahans Road, Perambur Barracks, Madras-12, in O.s.No.2563 R.S.No.2811/15 C.C>No.1270 measuring 1323 sq.ft. the said plot of land belonging to Dadar Sha Makkan bounded on the east by Mariam Bi Bi's house on the west by Strahans Road, 3rd lane on the north by Sulaiman Saheb's house and on the south by Rathnavelu Pillai's house within the Sub Registration District of Purasawalkam west and Registration District of Madras, reconstructed by each successive purchaser and not now in existence. Corporation Division No.27.

O.S.No.4847 of 1970

All that piece and parcel of land and superstructure bearing Old Door No.31, AL (New Door No.37/A), 3rd Lane, Strahans Road, Perambur Barracks, Madras-12, in C.S.N o.2653, R.S.No.2811/15, C.C.No.1270, measuring about 1323 sq.ft. the said plot of land belonging to the Dadar Sha Makhan bounded on the east by Marim Bee Bee's House, on the west by Trahana Road 3rd Lane on the North by Sulaiman Saheb's house and on the south by Rathinavelu Pillai's house within the Sub-Registration District of Purasawalkam West, Madras and the Registration District of Madras.

16.From the above, it is seen that the description of the suit properties are one and the same. The first respondent herein as a plaintiff filed a suit in O.S.No.4847 of 1970 wherein leasehold right has been declared and recovery of possession was granted. It is the argument of the learned counsel appearing for the appellant herein that during the pendency of the suit in O.S.No.4847 of 1970 the appellant herein purchased the property and after her purchase, she obtained permission from the Corporation and made construction. But to substantiate the same, she has not filed any documents. So, the argument advanced by the learned counsel appearing for the appellant that the suit property in O.S.No.4847 of 1970 is different from the suit property in the present suit in O.S.No.5432 of 1986 does not merit acceptance. As already stated, the suit property is one and the same and this issued has been substantially decided in the previous suit and the appellant herein is the sixth defendant in the previous suit. Hence, the present suit is hit by resjudicata.

17.At this juncture, it is appropriate to consider the decision relied upon by the learned counsel appearing for the appellant reported in AIR 2000 SC 1238 (Sajjadansahin Sayed Md. B.E. Edr. (D) by LR's. vs. Musa Dadabhai Ummer and others), wherein it was held that if a matter was only collaterally or incidentally in issue and decided in an earlier proceedings, the finding therein would not

ordinarily be resjudicata in a latter proceedings where the matter is directly and substantially in issue. It is appropriate to incorporate paragraph Nos.11, 12 and 14, which reads as follows:

"11.The words 'collaterally or incidentally in issue' have come up for interpretation in several common law jurisdictions in the context of the principle of res judicata. While the principle has been accepted that matters collaterally or incidentally in issue are not ordinarily res judicata, it has however been accepted that there are exceptions to this rule. The English, American, Australian and Indian Courts and Jurists have therefore proceeded to lay down certain tests to find out if even an earlier finding on such an issue can be res judicata in a later proceeding.

There appears to be a common thread in the tests laid down in all these countries.* We shall therefore refer to these developments.

*See Holdsworth History of English Law 147-54 (1944); Millar - The Historical Relation of Estoppel by Record 35 Ill.L.Rev.41 (1940); Millar - res Judicata in Continental and Anglo American Law - 39 Mich. L.R.1 (1940); Comparative Study (1940) Wisc L.R. 234; Development in Res Judicata 1952. 65 Harv. LR 818;

Matters collaterally or incidentally in issue:

12.It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

14.A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue (Mulla, CPC 15th Ed., p.104).

Difficulty in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and tests laid down in various Courts:"

There is no quarrel over the proposition. But the above

citation is not applicable to the facts of the present case.

18.It is an admitted fact that the landed property belong to the second respondent in which the first respondent was a lessee. She filed a suit for declaration that she holds the suit land and premises as lawful lessee of the second respondent and also for recovery of possession of land and superstructure stating that in the year 1947 one Syed Mohideen Saheb and his wife Kathoon Bi were the lessees in respect of the suit property from the second respondent herein and they made a construction and they are the owners of the superstructure. They sold the same to one Abdul Azim under the sale deed dated 20.01.1947 together with the lease hold right over the suit land. The said Abdul Azim borrowed Rs.200/- as loan from the husband of the first respondent herein and executed a mortgage deed in favour of the first respondent's husband setting the superstructure and the lease hold right over the suit property. Subsequently, in the year 1954, the said Abdul Azim took another Rs.500/- and executed a deed of mortgage cum conditional sale in favour of the first respondent and her husband on 15.10.1954. He undertook to repay the said amount with the entire interest accrued thereon on or before 14.04.1956. But he has not repaid that amount within the stipulated time. So, the first respondent and her husband are the owners of the property. They leased out the property to several lessees and one of the lessee was one Durairaj. But in O.S.No.4847 of 1970, they were denied the lease hold right. Hence, the first respondent filed a suit, in which the appellant herein was impleaded as 6th defendant, who has purchased the property from the 5th defendant in that suit. The appellant herein filed a separate written statement and contested the suit. In the said suit, several issues were framed and as per Ex.B5 dated 17.04.1973, it was held that she is entitled to declaration that she is the lawful lessee and recovery of possession as prayed for. Against which, the appellant herein preferred an appeal in A.S.No.1 of 1974, which was dismissed, that has been evidenced by Ex.B7, decreetal order Ex.B8. Against which, she preferred a second appeal in S.A.No.143 of 1976, which was dismissed on 23.08.1979 confirming the judgment and decree of the Trial Court, that has been evidenced by Ex.B1. So, the first respondent is having the lawful lease hold right and she is entitled for recovery of possession. The properties mentioned in 'A' and 'B' schedule are one and the same. But the learned counsel appearing for the appellant would submit that the suit properties are different and the said argument advanced by the learned counsel appearing for the appellant does not merit acceptance.

19.During the pendency of the suit, the appellant herein purchased the property from the fifth defendant in O.S.No.4847 of

1970 and made construction which will not take away the right of the first respondent. So, the suit properties are one and the same and the parties are also one and the same and hence, the issued has been substantially decided in the earlier suit itself. In such circumstances, the present suit is hit by resjudicata. Thus, Substantial Question of Law No.(a) is answered against the appellant.

20.In view of the answer given in Substantial Question of Law No.(a) and discussed as supra that the appellant is not entitled to any relief as the First Appellate Court has held that the suit is hit by resjudicata in view of the judgment and decree passed in O.S.No.4847 of 1970, the decree and judgment passed by the First Appellate Courts is a well reasoned one and hence, the same is hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

21.In fine,

- Second appeal is dismissed.
- Judgment and decree passed in A.S.No.39 of 2001 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Chennai-1 is hereby confirmed.
- There is no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

cse

To

1. The Additional District and Sessions Judge,
Fast Track Court No.III,
Chennai-1.
2. The IX Assistant Judge,
City Civil Court,
Chennai.

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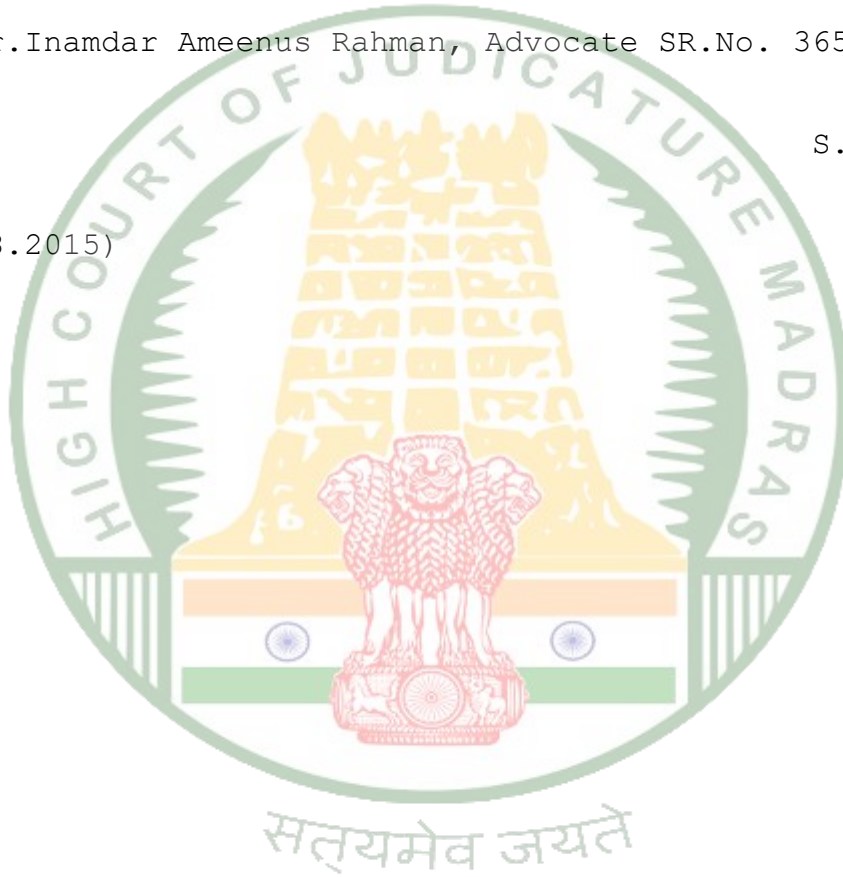
The Record Keeper,
V.R.Section,
High Court, Chennai.

3 CCs to Mr.S.Shaji Paul, Advocate SR.No. 36549

1 CC to Mr.Inamdar Ameenus Rahman, Advocate SR.No. 36502

S.A.No.177 of 2007

JSV (CO)
PSI (03.08.2015)



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