

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2019

PRONOUNCED ON : 05.03.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.385 & 386 of 2005

Jainambu Gani ...Appellant in both appeals/
Plaintiff/Ist Defendant

Vs.

Subhahani ...Respondent in
S.A.No.385 of 2005/Defendant

1. Halimath Sagiya
represented by Power of
Attorney Syed Mohamed

2. Noorjahan

3. M.Abdul Munab Respondents in
S.A.No.386 of 2005/
Plaintiff/Defendant 2 & 3

Prayer:-

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 15.04.2004 passed in A.S.Nos.88 of 2002 & 94 of 2003 on the file of the District Court, Nagapattinam, confirming the judgement and decree dated 06.12.2001 passed in OS.No.223 of 1999 & O.S.No.124 of 1997 on the file of the Principal Subordinate Judge, Nagapattinam.

For Appellant
in both appeals

: Mr.Srinath Sridevan

For Respondent
in both appeals

: Mr.V.Raghupathy

COMMON JUDGMENT

Second appeal Nos.385 & 386 of 2005 are directed against the common judgement and decree dated 15.04.2004 passed in A.S.Nos.88 of 2002 & 94 of 2003 on the file of the District Court, Nagapattinam, confirming the judgement and decree dated 06.12.2001 passed in O.S.Nos. 223 of 1999 and 124 of 1997 on the file of the Principal Subordinate, Nagapattinam.

2.The second appeals have been admitted on the following substantial questions of law:

"(a).Whether the Court can examine a document not before it, in private and without making it subject to scrutiny by counsels of either side?

(b).Whether the finding arrived at by the District Court on the basis of the original record perused by the learned District Judge, pertaining to the original decree in O.S.No.37 of 1952, in private, are legally valid or binding? and

(c).Whether the Appellate Court has not misread the entire case by ignoring the fact that the appellants are pleading adverse possession in respect of the extent of 3 feet?"

3.After hearing the submissions of the counsel for the appellant and the respondents, inasmuch as I deem it fit to remand the matter back to the first appellate Court for the consideration of the issues involved between the parties in the lis once again, for the reasons mentioned infra, it is not proposed to discuss the case of the respective parties in detail nor it is necessary to go into the merits or demerits the contentions qua the case of the respective parties one way or the other.

4.The parties are referred to as per their rankings in the trial Court, for the sake of convenience.

5.The plaintiff has laid the suit in O.S.No.124 of 1997 against the defendants for the relief of mandatory injunction and other consequential relief. The first defendant in O.S.No.124 of 1997 had laid the suit in O.S.No.223 of 1999 against one Subhahani for the relief of permanent injunction.

6.Inasmuch as the issues involved between the parties in

both the suits are one and the same in respect of the subject matter, it is found that the abovesaid two suits laid by the respective parties were jointly tried and based on the evidence adduced by the respective parties, both oral and documentary, the trial Court was pleased to decree the suit laid by the plaintiff in O.S.No.124 of 1997 and dismissed the suit laid by the first defendant in O.S.No.223 of 1999. Aggrieved over the same, the first defendant had preferred the first appeals in A.S.Nos.88 of 2002 and 94 of 2003.

7.As could be seen from the case projected by the respective parties, it is found that both the parties rest their case mainly upon the construction of the decree passed in O.S.No.37 of 1952, which document has come to be marked as Ex.A1. Thus, it is found that the construction of Ex.A1 decree one way or the other in the right perspective would lead to the determination as to the entitlement which the respective parties put forth as regards their claim to the subject matter involved in the suit. As could be seen from the materials available on record, the decree passed in O.S.No.37 of 1952 marked as Ex.A1 is also found to be enclosed along with the commissioner's report and the report also reads as if the same is attached with the plan, however, the document marked as Ex.A1 did not contain the plan as described in the report or the decree marked as Ex.A1. In any event, the trial Court had proceeded with the matter and based on the available evidence on record adduced by the respective parties, and endeavoured to dispose of the lis preferred by the respective parties, as above noted. Aggrieved over the same, as above seen, the first defendant has preferred the first appeals.

8.On a perusal of the judgement of the first appellate Court, it is found that the first appellate Court, on noting that the decree copy marked as Ex.A1 enclosed with the commissioner's report also referred to the plan, for a better understanding of the property allotted to the respective parties under the decree and on noting that the plan referred to therein not having been enclosed by the plaintiff, suo motu appears to have gone to the record room of the District Court without any intimation to either of the parties to the lis or their counsel and on a search of the records pertaining to O.S.No.37/1952 in the record room, noted that the plan referred to by the Commissioner formed part of the concerned records in the record room of the District Court and accordingly, perused the said plan for determining the issues involved between the parties in the matter and taken the same into consideration and the same has been clearly referred to in the judgement of the first appellate Court.

9.During the course of arguments, the defendants' counsel contended that the plan noted, perused and considered by the first appellate Court suo motu by visiting the record room and

perusing the records in O.S.No.37 of 1952 has not been brought to the knowledge of the defendant or her counsel and also put forth that it had not been brought to the knowledge of the plaintiff and his counsel and accordingly, contended that the District Court has committed a serious error in examining certain records privately Suo Motu in the record room without informing the parties to the lis or their counsel and also without furnishing an opportunity to the parties or their counsel to scrutinise the same and offer their views thereof with reference to the same and on the other hand, in isolation endeavoured to peruse and considered the same to determine the issues involved in the matter one way or the other. In the light of the abovesaid endeavours adopted by the first appellate Court in showing a special interest, one way or the other in suo motu visiting the record room of the District Court and perusing the records pertaining to the lis, and also taken the same into consideration as narrated in the judgement, in such view of the matter, as rightly put forth by the defendants counsel, the abovesaid approach of the District Court in proceeding to determine the issues involved between the parties as regards the subject matter would amount to nothing but gross illegality and on the abovesaid premise alone, in my considered opinion, the judgement and decree of the first appellate Court cannot be sustained in the eyes of law.

10.The plaintiff's counsel has also fairly admitted that to his knowledge even the plaintiff or his counsel has not been furnished with the copy of the records seen by the District Court in the record room privately and it is stated that the same had been taken into consideration by the District Court independently on his own. Thus it is seen that the findings arrived at by the District Court on the basis of the documents scrutinised by him in private without notice to either of the parties are found to be per se illegal, perverse and irrational.

11.If at all, as rightly put forth, the District Court felt that the decree copy passed in O.S.No.37 of 1952 marked as Ex.A1 is not in full shape, particularly, not having the plan referred to in the same one way or the other and felt that unless the plan is attached to the same, the issues involved between the parties cannot be sorted out or determined one way or other, on coming to the said conclusion, the District Court should have called upon the plaintiff to produce the complete document and take all the endeavours to attach the plan also along with the decree and on that determination, should have either remitted the matter back to the trial Court for a fresh consideration of the issues involved between the parties as regards the subject matter or should have on its own, after giving notice to the defendant with reference to the plan projected by the plaintiff on being directed and after ascertaining their views, with reference to

the same, should have proceeded further in the hearing of the appeal and determined the issues involved between the parties one way or the other. On the other hand, the District Court taking self interest in the matter, is found to have privately gone to the record room and seen the records concerned with reference to the subject matter on his own and also admitted that the same had been taken into consideration by him for determining the issues involved in the matter. Furthermore, as rightly put forth, if the District Court had felt that the record seen by him in the record room privately is essential for determining the issues involved in the matter, at least, should have apprised the same to the parties concerned or their counsel as per law and invited their views or objections to the same and accordingly, when the plaintiff had not produced the plan along with the decree copy filed by him as Ex.A1 and the District Court having endeavoured to consider the plan attached to the decree by suo motu perusing the same in the record room on its own, should have at least called for a finding from the trial Court with reference to the same, after determining that the said document is essential for adjudicating the issues involved in the matter and thereby, should have enabled the parties to the lis to adduce evidence with reference to the same one way or the other, so that, the parties to the lis would have been thereby provided an opportunity to present their respective cases with reference to the same as per law and on receiving the findings from the trial Court pertaining to the same, should have proceeded with the disposal of the appeals one way or the other as per law.

12.However, the District Court has not embarked upon such procedure contemplated under law and on the other hand, for the reasons best known to the District Court, independently and without notice to either of the parties or their counsel, perused the records concerning the subject matter in the record room and after taking the same into consideration, proceeded or endeavoured to dispose of the first appeals and thereby, determined the issues involved between the parties one way or the other.

13.In the light of the abovesaid position, in my considered opinion, on the face of it, when the judgement and decree of the District Court in the first appeals had been pronounced by taking into consideration certain records in private and without making it known and subjecting the same to the scrutiny of the concerned parties and their counsels as per law and inviting their views with reference to the same, the findings rendered by the District Court on the basis of the record seen and perused by him and considered by him only, have to be only construed or held as perverse, illogical and irrational and not lawfully determined and in such view of the matter, in my considered opinion, on that score alone, the judgement and decree of the first appellate Court passed in the appeals are liable to be set aside as the

same are not valid as per law and binding upon the parties concerned.

14.The parties to the lis had made various pleas with reference to the respective cases, however, in my considered opinion, it is not proper to refer the abovesaid pleas in detail one way or the other in the light of the abovesaid determination to remit the matter back to the District Court for a fresh consideration of the first appeals as per law and accordingly, the same are not adverted to in any manner.

15.In the light of the abovesaid discussions, the substantial questions of law (1) and (2) formulated in the second appeal are accordingly answered in favour of the defendant. Inasmuch as the matter is being remitted back to the first appellate Court for determining the issues afresh, the third substantial question of law formulated in the second appeal is not answered.

16.In the light of the above discussions, the Judgement and Decree dated 15.04.2004 passed in A.S.Nos.88 of 2002 & 94 of 2003 on the file of the District Court, Nagapattinam are set aside and the matter is remitted back to the District Court for a fresh consideration of the issues involved between the parties and prior to the same, the District Court is directed to furnish the copy of the record seen by it in the record room and considered by it and inasmuch as the document had already been seen and considered by the District Court, the same would tantamount to the consideration of an additional evidence by the District Court in the first appeals, accordingly, should endeavour to determine the point whether the said document should be received and marked as additional evidence in the first appeals as per law and accordingly, in the event of determining that the said document is essential for determining the issues involved between the parties, after the reception of the additional document and marking the same in the matter, provide adequate opportunities to both the parties to adduce evidence with reference to the same as contemplated under law and thereafter, proceed to dispose of the first appeals on merits in accordance with law. Accordingly, the second appeals are disposed of. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sms

To

1.The District Judge,
Nagapattinam.

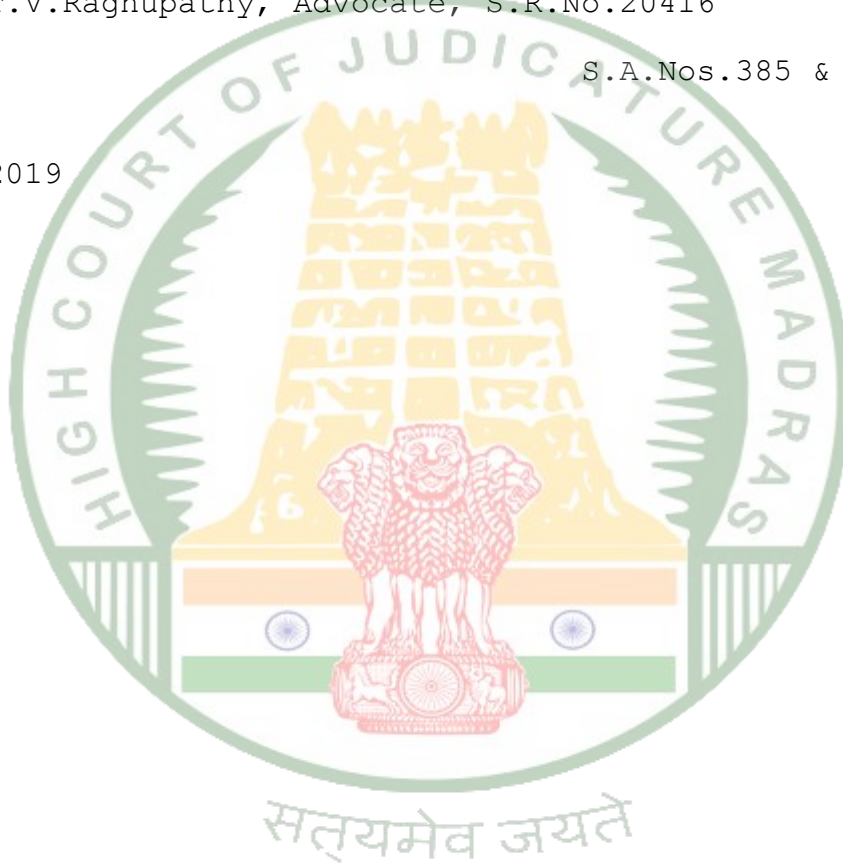
2.The Principal Subordinate Judge,
Nagapattinam.

3.The Section Officer,
V.R. Section,
High Court, Madras-104.

+2cc to Mr.V.Raghupathy, Advocate, S.R.No.20416

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KK (CO)
CS/13/09/2019



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