

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2016

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE R.MAHADEVAN

O.S.A.No.185 of 2016

Appu John Estates Charitable Trust
rep. by its Trustee: S.C.Vijayakumar
No.23, Nungambakkam High Road,
Nungambakkam, Chennai 600 034. .. Appellant

versus

1. V.K.John
2.W.S.Seetharaman
3.Prema Chandrasekhar
4.T.R.T.Thirumalvasi .. Respondents

Appeals filed under Order 36 Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent Act, against the order dated 12.07.2016 passed in A.No.2873 of 2014 in C.S.No.423 of 1995 on the file of this Court.

A.No.2873/14:Application praying to pass an order to implead Appu John Estates Charitable Trust, rep by its Trustee S.C.Vijayakumar NO.23, Nungambakkam High Road, Nungambakkam, CHennai-34 as 6th defendant in the above suit in the place of T.R.T.Thirumalavasi/5th Defendant

For Appellant .. Mr.P.C.Harikumar for
M/s.P.C.Charikumar &
Associates

For Respondents .. Mr.Abraham Markos
for M/s.King and Patridge for
R.1
Mr.K.P.Gopalakrishnan for R.3
(No Appearance)

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J U D G M E N T

(Judgement of the Court was delivered by The Hon'ble Chief Justice)

Admit.

2. Learned counsel for the respondents accept notice.

3. At the request of the learned counsel for the parties, the appeal is taken up for final disposal.

4. The appeal is directed against the order of the learned Single Judge dated 12.07.2016, dismissing the application of the applicant seeking to implead Appu John Estates Charitable Trust, a party in the partition suit, as the 6th defendant.

5. The first respondent before us is the plaintiff in the suit, who sought partition against his uncle and aunt, impleaded as first two defendants. The aunt passed away on 24.04.2001, and thus, the third defendant was impleaded as the legal heir vide order dated 18.04.2006. Subsequently, the first defendant Appu John, being uncle, also died on 28.07.2007 and on his demise, the fourth and fifth defendants sought impleadment. These applications were ordered on 29.04.2002 and 03.06.2007 respectively, taking into consideration the fact that an alleged Will dated 03.06.2007 executed by Late Appu John had appointed 5th defendant as an Executor. The appeal filed against the same was however dismissed by the Division Bench noticing that the impleadment was for the purpose of taking part in the Civil Suit to secure representation of the deceased Appu John for determination of his share and also clarifying that the claim of the said defendants could not be decided in the partition suit, as they were to be determined in a testamentary suit.

6. The further endeavour in respect of the proof affidavit filed by the 5th defendant to be struck off, as pleaded by the appellant in Appn.No.3481 of 2011, was not successful when that application was dismissed on 06.09.2012.

7. The 5th defendant also died on 08.12.2012 and the appeal pending in the mean time in respect of that aspect was disposed of on 06.03.2013.

8. The case of the appellant is that during the life time of the said Executor under the alleged Will dated 03.06.2007, a trust was created in the name and style of 'Appu John Estates

Charitable Trust'' by virtue of a deed of trust dated 30.04.2009, which was duly registered and the 6th defendant was the founder of the trust. Thus, the application was filed seeking substitution of the trust to represent the estate of the deceased Appu John.

9. The learned single Judge took note of the fact that no testamentary proceeding has been initiated by the beneficiary under the Will and referred to the provisions of Section 232 of the Indian Succession Act, 1925 by observing that the objective of the said Section was to protect the possible rights or the needs of the kin to effect the administration of their estate, when no Executor has been appointed. However, the last alleged Will of the deceased Appu John dated 03.06.2007 made bequest to several persons, and thus, unless the Executor proves the Will in probate proceeding or if the Executor died during the pendency of probate proceedings, before the proof of the Will, the petition for grant of probate by the Executor can be amended for want of issuance of Letters of Administration at the instance of the beneficiary under the Will. The application was accordingly dismissed.

10. We have heard the learned counsel for the parties.

11. In our view, the contention of the learned counsel for the appellant cannot be brushed aside. The trust deed dated 30.04.2009 was created by the 5th respondent in the capacity of an Executor of the Will of Late Appu John. We have already noticed that there were two wills sought to be propounded and in order to represent the effect of the Will, the impleadment of 5th respondent was upheld by the Division Bench vide order dated 17.04.2008 on the premise that the Executor may not be a necessary party in a partition suit, but then the deceased Appu John could not be let undefended, and it was necessary to secure the representation of the deceased Appu John. Defendant No.4 is the legatee of the other Will propounded.

12. The aforesaid being the position, on the demise of the Executor, the plea that the Trust allegedly created by him in respect of the estate of late Appu John should be represented before the Court so that late Appu John does not go unrepresented, equally applies in the present case.

13. We may note that the learned counsel for the appellant has already conceded that no further evidence has to be led in the suit and that the 5th defendant, though had filed an affidavit of examination-in-Chief, passed away prior to the completion of the cross examination.

14. In view aforesaid, to the limited extent that the deceased Appu John should not be left undefended, we permit the appellant to be impleaded as the 6th defendant on terms and conditions set out herein above.

15. The Original Side Appeal is accordingly allowed, leaving the parties to bear their own costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ksr

To
The Sub Assistant Registrar
Original Side High Court Madras

+1 cc to Mr.P.C.harikumar & Associates Advocate sr 65335
+2 ccs to M/s.King & Partridge Advocate sr 65675
+1 cc to M/s.K.P.Gopalakrishnan Advocate sr 66075

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