

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.NO.1048 OF 2019

Louie Joseph (Died)

1.Elizabeth

2.Mary

3.Akkim Mary

4.Weslin Mary

5.Ebil Singh

..Appellants/Defendant

Vs.

1.Hary Joseph @ Truemen

2.Veronica

3.Isabella

4.Mosac

..Respondents/Plaintiffs

Prayer:

Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 13.08.2019 passed in A.S.No.385 of 2018 on the file of XVith Additional Judge, City Civil Court, at madras confirming the judgment in I.A.No.4373/2007 in O.S.No.2472 of 2004 order dated 24.01.2014 o the file of XVIIIth Assistant Judge, City Civil Court at Madras.

For Appellants : Mr.A.M.Krishnamoorthy

J U D G M E N T
सत्यमेव जयते

The legal representatives of the respondent in I.A.No.4373 of 2007 have come forward with this second appeal aggrieved by the concurrent judgment of the Courts below allowing the application for passing of final decree.

2. The suit in O.S.No.2472 of 2004 was filed by the petitioners in I.A.No.4373 of 2007 seeking partition and separate possession of the first plaintiff's share in the 'A' schedule property and 1/4th share of the 2nd, 3rd and 4th plaintiffs in the 'B' schedule property. The said suit was decreed on 03.04.2006. The predecessor in interest of the petitioners filed an appeal in A.S.No.545 of 2008, which also

came to be dismissed on 16.09.2011 confirming the preliminary decree. It is stated that the second appeal in S.A.No.12 of 2013 was filed, challenging the said preliminary decree and the same was dismissed for default on 17.12.2018. It is stated that the application to restore the appeal is pending. While so, the respondents came up with I.A.No.4373 of 2007 seeking passing of final decree. The final decree application was resisted by the predecessor in interest of the appellants contending that the preliminary decree itself is flawed. According to him, the Courts below were not right in granting a preliminary decree in the absence of a probate or letters of administration having been issued to the Will which was relied upon by the plaintiffs. The Courts below rightly rejected the said argument and concluded that in view of the Section 97 of the Code of Civil Procedure, the respondent namely, the predecessor in interest of the appellants cannot challenge the judgment and the preliminary decree during the final decree proceedings. Having held so, the Courts below passed a final decree based on the suggestions for division made by the Advocate Commissioner appointed in the final decree proceedings. Aggrieved, the appellants have come up with this second appeal.

3. I have heard Mr.A.M.Krishnamoorthy, learned counsel appearing for the appellants.

4. Mr.A.M.Krishnamoorthy would vehemently contend that in the absence of probate or letters of administration having been granted to the Will dated 20.04.1978 executed by Lourdhu Mary, grandmother of the plaintiffs, the Courts below were not right in granting a final decree. The very same question has been agitated in the preliminary proceedings and the Courts were found that the Will executed by Lourdhu Mary on 20.04.1978 is true and valid. Admittedly, the second appeal filed against the preliminary decree and judgment has also been dismissed as of today. Section 97 of the Code of Civil Procedure reads as follows:-

"97. Appeal from final decree where no appeal from preliminary decree- Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

5. In view of the above, the appellants are precluded from questioning the validity of the preliminary decree in the final decree proceedings. The Courts below have found that neither the appellants nor their predecessor had objected to the allotment of shares made by the Commissioner. The predecessor of Appellants had only raised questions relating to the validity

of the preliminary decree and invited the Court to go into the correctness of the findings of the Trial Court and lower Appellate Court rendered while passing of the preliminary decree. Section 97 clearly bars such pleadings or a challenge to the findings at the preliminary decree stage during the final decree proceedings. Hence, I do not find any error in the approach of the Courts below in rejecting the contentions raised by the predecessor of the appellants and granting a final decree. I do not see any question of law much less a substantial question of law in order to enable this Court to entertain this appeal. Hence, this second appeal is dismissed without being admitted. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To:-

1. The XVI - Additional Judge, City Civil Court, Chennai.
2. The XVIII - Assistant Judge, City Civil Court, Chennai.

+1cc to Mr.A.M.Krishnamoorthy, Advocate, S.R.No.89550

S.A.No.1048 of 2019

VGII (CO)
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सत्यमेव जयते

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