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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2021

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THE HON'BLE MR. JUSTICE M.SUNDAR

S.A.No.96 of 2019
&
C.M.P.No.2085 of 2019

Abdul Samadh

... Appellant

Vs.

1. Saidhani
2. Shameem
3. Shehanaz
4. Anwar Basha

... Respondents

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in A.S.No.27 of 2013 on the file of the I Additional District and Sessions Judge, Cuddalore dated 16.08.2018 confirming the judgment and decree passed in O.S.No.3 of 2009 on the file of the II Additional Sub-ordinate Judge, Cuddalore, dated 31.01.2013..

For Appellant : Mr.R.babu

For Respondents : Mr.R.Muralidharan

JUDGMENT

Captioned second appeal i.e., S.A.No.96 of 2019 was presented in this Court more than 2 years ago, to be precise on 02.01.2019. Mr.R.Babu, learned counsel on record for lone appellant in the second appeal is before this Virtual Court.

2. Litigation, which has lead to captioned second appeal commenced more than one decade and two years ago i.e., more than 12 years ago, to be precise on 27.01.2009 when the three



respondents in captioned second appeal arraying themselves as three plaintiffs presented a plaint in 'II Additional Subordinate Judge, Cuddalore' (hereinafter 'trial Court' for the sake of brevity) and this plaint was taken on file by trial Court as O.S.No.3 of 2009. In the suit, lone appellant in captioned second appeal was arrayed as first defendant and the fourth respondent in captioned second appeal was arrayed as second defendant. Prayer in the suit was for a decree of partition qua suit property (three equal shares and allotment of one share i.e., 1/3rd share of suit property to each of the plaintiffs). The usual prayer in a partition suit for appointment of Advocate Commissioner for dividing the suit property into metes and bounds, besides prayer limb for costs and the usual residuary limb of any prayer was also there.

3. Suit property is land ad-measuring 3249 ½ sq.ft or thereabouts with RCC roofed building superstructure thereon at Old No.39, New No.118 in Ward No.7, Block No.26 in T.S.No.1626 situate within the jurisdiction of Cuddalore Municipal Limits and as far as registration districts are concerned, within Cuddalore Registration District. The basis on which the three plaintiffs sought partition and separate possession qua suit property and the manner in which the suit property devolved upon the parties has been captured by way of pleadings of the plaintiffs in Paragraph 1 of the plaint, which reads as follows:

'1. It is humbly submitted that the suit property has it's origin from the ancestors namely one Abdul Ajeez, S/o.Sheik Hussain and one Jainulabideen, S/o.M.S.Abdul Khadar. Both of the above were enjoying some of the ancestral properties in common. On 11.03.1940, a partition was made between the two and according to the same, Andul Ajeez received the A schedule of the property and Jainulabideen obtained the B schedule property. The registration copy of the partition deed is filed herewith. Since the partition, the B schedule property which is the suit property herein was under the possession and enjoyment of Jainulabideen. The said Jainulabideen had two daughters namely 1.J.Khathoonbi and 2.J.Mahaboobbi and four sons namely 1.Sheik Khadar, 2.J.Abdul Samadh (first defendant), 3.Anwar Basha (second defendant) and 4.J.Sheik Mohammed. After the death of Jainulabideen and his wife Zulaika Bee, the suit property devolved



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around the above six legal heirs of the said Jainulabideen. On 04.09.1981, the two daughters namely 1.J.Khathoonbi and 2.J.Mahaboobbi and one of the sons of Jainulabideen namely Sheik Khadar relinquished their share in the suit property there by making a release deed in favour of the defendants and the other son of Jainulabideen namely J.Sheik Mohammed. Since then the suit property was under the possession and enjoyment of the defendants and the said J.Sheik Mohammed. On 15.12.2007 the said J.Sheik Mohammed died leaving behind the plaintiffs intestate. The first plaintiff is the wife and the 2nd and the 3rd plaintiffs are daughters of the said J.Sheik Mohammed. After the death of the said J.Sheik Mohammed his right of share in the suit property immediately vests with the plaintiffs. The plaintiffs are entitled for the share in the suit property which the said J.Sheik Mohammed was supposed to inherit.'

4. The defendants i.e., appellant as first defendant and fourth respondent as second defendant on being served with suit summons entered appearance through counsel, filed a written statement and completed pleadings. The burden of the song qua pleadings of the first defendant (appellant before me) is that he maintained the entire family, cared for younger brothers and also performed the marriages by spending substantial money. It was contended that he alone lived in the suit property. It was specifically pleaded that the first defendant had made huge sacrifices for the family and there has been a oral relinquishment of shares in the suit property in favour of the first defendant 15 years earlier i.e., 15 years prior to the written statement. However, written statement, as placed before me, does not contain a date. Be that as it may, there was full contest before the trial Court. By full contest, it is meant that there were as many as 7 exhibits on the side of the plaintiff, namely Exs.A1 to A7 and two witnesses were examined on the side of plaintiff, namely PW1 and PW2. There were four exhibits, namely Exs.B1 to B4 and three witnesses were examined on the side of the defendants, namely DW1 to DW3. To be noted, the first defendant examined himself as DW1 and there was a plea of adverse possession also. After full contest, in and by judgment and decree dated 31.01.2013, the trial Court passed a preliminary decree. This was carried in appeal by the first defendant (appellant before me) by way of a regular first appeal



under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) vide A.S.No.27 of 2013 on the file of 'I Additional District and Sessions Court, Cuddalore' (hereinafter 'First Appellate Court' for the sake of brevity). The first Appellate Court framed points for determination and answered the same in favour of the plaintiffs. In other words, the appeal was dismissed by confirming the aforementioned judgment and decree of the trial Court. Against these two concurrent judgments and decrees, the first defendant in the trial Court is before this Court under Section 100 CPC.

5. Mr.R.Babu, learned counsel adverting to the memorandum of grounds of appeal in captioned second appeal drew the attention of this Court to two questions which have been set out therein and contended that they are substantial questions of law which arise in the case on hand. These questions are as follows:

'a) Whether the courts below were right in entertaining the suit, which is barred by limitation?

b) Whether the courts below were right in decreeing the suit even after plaintiff's right has been extinguished and appellant/1st defendant has perfected title by adverse possession?'

6. It is necessary to capture the trajectory of the captioned second appeal as captioned second appeal itself was presented in this Court more than 12 years ago as alluded to supra.

7. The captioned second appeal has not been admitted, but proceedings dated 29.03.2019 have been made by predecessor Hon'ble Judge, which reads as follows:

'Today, when the matter taken up for hearing, the learned counsel appearing for the appellant submitted that the Suit property is a house property, wherein the appellant is now residing. Now, he is also willing to purchase the remaining shares of the respondents. Hence, the matter may be referred to Mediation and Conciliation Centre. The learned counsel appearing for the respondent also submitted that he has no objection for the same.

2. It is also submitted that all the parties are aged people and they are not in a position to come to Chennai, and hence, the mediation may be conducted in



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the District Mediation Centre at Cuddalore.

3. Considering the above circumstances, the Registry is directed to send the papers immediately to the District Mediation Centre, attached to District Court, Cuddalore, and the District Mediation Centre is directed to take up the matter for mediation on on 11.04.2019. After mediation, the matter is directed to be posted for hearing before this Court on 24.04.2019.'

8. Mr.R.Muralidharan, learned counsel who was on caveat on behalf of the respondent and who has joined the Virtual Court today submits that no settlement could be arrived at in the District Mediation Centre and therefore, the captioned second appeal has to be tested on merits for admission.

9. This takes us to the two questions which have been projected as substantial questions of law by learned counsel for appellant.

10. Before proceeding further, this Court reminds itself of two recent judgments of Hon'ble Supreme Court being Kanailal case [Kanailal and Others Vs. Ram Chandra Singh and Others reported in (2018) 13 SCC 715] and Kirpa Ram case [Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935]. In Kanailal case Hon'ble Supreme Court has held that Order XLI Rule 31 CPC principles stand telescoped into a second appeal legal drill under Section 100 CPC. In Kirpa Ram case, Hon'ble Supreme Court has reiterated the position that second appeal can be dismissed at the admission stage without formulating a substantial question of law if none arises. This Court, on a conjoint and combined reading of these two principles, deems it appropriate to set out that the lone point for determination that arises in instant second appeal is whether any substantial question arises on the/out of two concurrent fact finding in judgments / decrees of two courts below and qua the arguments that have been advanced now in this second appeal. This point for determination shall be tested hereon, decision given infra and the reasons for decision will also be set out.

11. For the aforesaid exercise, it is necessary to remind myself about what the expression 'substantial question of law' occurring in Section 100 CPC. This was first explained in Rimmalapudi Subba Rao's case [Rimmalapudi Subba Rao Vs. Noony



Veeraju And Others reported in AIR 1951 Madras 969 (FB)]. This Rimmalapudi Subba Rao principle rendered by a Hon'ble Full Bench of this Court (Madras High Court) was reiterated by Hon'ble Constitution Bench of Supreme Court in another celebrated case, namely Chunilal Mehta's case [Sir Chunilal V.Mehta and Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314]. It is also known as Century Spinning Mill case. Paragraph 6 of Century Spinning Mill case is relevant and the same reads as follows:

'6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law. '

12. Rimmalapudi Subba Rao principle as affirmed by another celebrated judgment namely Chunilal Mehta's case, which is also known as Century Spinning Mill case was neatly captured and reiterated by Hon'ble Supreme Court subsequently in Santosh Hazari case [Santosh Hazari Vs. Purushottam Tiwari (Deceased) by Lrs reported in (2001) 3 SCC 179]. Relevant paragraph in Santosh Hazari case is paragraph 12 and the same reads as follows:

'12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or



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consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta* [AIR 1928 PC 172 : 55 IA 235], the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.* [AIR 1962 SC 1314 : 1962 Supp (3) SCR 549] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [ILR 1952 Mad 264 : AIR 1951 Mad 969] :

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law." and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether



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it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."'

13. The aforesaid adumbration of determinants as to what the expression 'substantial question of law' occurring in Section 100 CPC means is the obtaining position as the same has been followed even as recently as in 2016 in Malan Bi case [Syeda Rahimunnisa Vs Malan Bi (dead) by legal representatives and another reported in (2016) 10 SCC 315].

14. Notwithstanding very many grounds and notwithstanding very many pleas that have been raised before the trial Court and the first Appellate Court, the arguments before me are focused on the aforementioned two questions set out in the memorandum of grounds of appeal saying that the same are substantial questions of law. The first question needs no elucidation as it is very well settled that there is no limitation in a partition suit. This draws the curtains on Question No.(a).

15. This takes us to the second question. With regard to the second question it turns on perfecting title by adverse possession. This is for all practical purposes Issue No.4 before the trial Court, which reads as follows:

'4. Whether the 1st defendant being in open hostile and uninterrupted possession of the suit property for well over the statutory period and thereby has prescribed for title by adverse possession and ouster?'

16. This Issue No.4 has been answered by the trial Court in Paragraph 19 of its judgment, which reads as follows:



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'19. The 3rd major ground taken by the 1st defendant is adverse possession and ouster. In order to claim adverse possession one must expressly, openly claim adverse possession by admitting the title of the others. Technically speaking the plea of adverse possession and ouster taken by the 1st defendant is wrong. Because, to take a plea of adverse possession one must admit the title of others. Without admitting the title of the other there cannot be an adverse possession. In the present case, the 1st defendant completely denied the title of the plaintiffs and their predecessors. He says that the late Sheik Mohammed relinquished his share in favour of the 1st defendant. If it is so, where is the question of adverse possession?

17. There is no difficulty in saying that the trial Court was correct in saying that one has to admit the title of the adversary to claim adverse possession. Having noticed this legal position, the trial Court has held that without admitting the title and after denying the title of the plaintiffs and their predecessors, it is pleaded that there is relinquishment of shares in favour of the first defendant and the question of adverse possession does not arise. There is absolutely no reason to deviate much less disagree with this finding of the trial Court.

18. This takes us to the judgment of the first Appellate Court. The first Appellate Court, being a Court of fact, has also looked into the evidence before it and in paragraph 20 of the judgment of the first Appellate Court, it has held that technically speaking the plea of adverse possession being taken by the first defendant is wrong and the finding of the trial Court in this regard is correct. Paragraph 20 of the first Appellate Court judgment reads as follows:

'20. The Third contention of the Appellate is that the 1st Defendant is having prescriptive title over the Suit property by way of adverse possession. The Trial Court has held that "technically speaking the plea of adverse possession and ouster taken by the 1st Defendant is wrong". Because, to take a plea of adverse possession one must admit the title of others. Without admitting the title of the others, there cannot be a



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plea of adverse possession. In the present case, the 1st Defendant has denied the title of the Plaintiffs. Coming to the question of adverse possession, the 1st Defendant states that the Property Tax and the Electricity Charges are being paid by the 1st Defendant and the 1st Defendant is being upon, hostile, and in uninterrupted possession of the Suit property for well over the statutory period, he has prescribed. Title, by adverse possession and ouster. Further, the 1st Defendant pleads that he allowed the Plaintiffs to continue to live in the house and the occupation of the house by the Plaintiffs is purely permissive in nature and they do not have any share after the relinquishment. It was well resisted by the Plaintiff during the cross examination of D.W.2. During cross examination, the D.W.1 (1st Defendant Abdul Samad), has deposed to the effect that Sheik Mohamed and 2nd Defendant Anwar Basha had released their shares in favour of him orally, he do not remember the date. However, it was after 04.09.81. Even after the release, the House Tax stands in the name of his father. The 2nd Defendant was in the Suit property and had his education. It is correct to say that the House Tax stands in the name of his father. It is correct to say that there are two electricity connection in the Suit property. One stands in his name and another stands in the name of his father. It is correct to say that the Form-A, Ex.B4 stands in the name of his father.'

19. To be noted, the first Appellate Court has also examined the question as to whether the trial Court has failed to see that the claim is barred by limitation and held that in the light of there being no limitation for a partition suit and in the light of specific finding that oral relinquishment has neither been proved nor has been shown to be sustainable in law, the question of limitation does not arise being a partition suit. This Court finds no infirmity in this approach, much less an infirmity which leads to a substantial question of law in a Section 100 (CPC) legal drill.

20. In the light of the narrative thus far, both the questions projected before this Court and contended to be substantial questions of law do not qualify as substantial



questions of law if the Rimmalapudi Subba Rao principle is applied as there is no disputation that there is no legal issue that is debatable and there is nothing demonstrated to be res integra besides nothing demonstrable to show settled principles have been disregarded in the case on hand. There is also nothing to demonstrate that the settled principle of law has been given a go by. To put it differently, no substantial question of law i.e., substantial question of law occurring in Section 100 CPC arises in the case on hand. This Court has already referred to Kirpa Ram principle laid down by Hon'ble Supreme Court wherein it has been reiterated that a second appeal can be dismissed at the admission stage if no substantial question of law arises. Following the Kirpa Ram principle, as the captioned second appeal is of the year 2019, which has not been admitted as yet, the same is dismissed at the admission stage on the ground that no substantial question of law arises. In the light of the relationship between the parties, trajectory the matter has taken and owing to the nature of the submissions made before this Court, there shall be no order as to costs. Consequently, C.M.P.No. 2085 of 2019 is also dismissed.

Sd/-

Assistant Registrar(CS-V)

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Sub Assistant Registrar

gpa

To

1. The I Additional District and Sessions Judge,
Cuddalore.

2. The II Additional Sub-ordinate Judge,
Cuddalore,

+1cc to M/s.B.Kumaraswamy, Advocate, S.R.No.22778

+1cc to M/s.R.Murali Dharan, Advocate, S.R.No.22779

S.A.No.96 of 2019 &
C.M.P.No.2085 of 2019

VSN(CO)
SB(22/09/2021)