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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2021

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A.NO.983 OF 2006

1.Krishnan (died) ...1st Appellant / Plaintiff

2.S.K.Chengaiyan

3.S.K.Muniratinam

4.S.K.Padmanabhan

5.S.K.Balaraman

appellants 2 to 5 are brought on record
as LR's of the deceased sole appellant vide
order dated 27.11.2007 made in MP.1/2007
in SA.983 of 2006.

...Appellants 2 to 5 / Respondent /
Plaintiff

Vs.

1.Nallathi

2.Shanmugham

3.Yuvaraj

4.Guna

5.Mahendiran

6.Chitra

...Respondents / Appellants /
Defendants

Prayer : The Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 31.01.2006 made in AS.No.15 of 2005 on the file of the Sub Court, Gudiyatham, Vellore District reversing the judgment and decree dated 31.01.2005 made in OS.No.786 of 1993 on the file of the District Munsif, Gudiyatham, Vellore District.

For Appellants : Mr.T.Dhanyakumar

For Respondents : M/s.T.R.Rajaraman for R1 to R6.



J U D G M E N T

(This case has been heard through video conference)

This Second Appeal has been filed challenging the common judgment and decree passed by the lower appellate Court on 31.01.2006 in AS.Nos.14 and 15 of 2005 whereby the judgment and decree passed by the trial Court on 31.01.2005 in favour of the appellant in OS.No.786 of 1993 was reversed.

2. The appellants are the plaintiffs in the suit in OS.No.786 of 1993 on the file of the District Munsif, Gudiyatham. They sought for the relief of declaration and injunction in the said suit relying upon the Will dated 30.04.1970, which has been marked as Ex.B4 before the Trial Court. Even prior to the filing of the suit in OS.No.786 of 1993 the respondents have filed a suit in OS.No.652 of 1988 before the very same District Munsif Court seeking for a declaration and injunction claiming that they are the absolute owners of the suit schedule property based on a sale deed dated 21.07.1964 which has been marked as Ex.A1 before the trial Court.

3. Since, the issues involved in both the suits are common, the trial Court disposed of both the suits in OS.No.652 of 1988 and OS.No.786 of 1993 by a common judgment and decree dated 31.01.2005. By the common judgment and decree, the suit filed by the appellant in OS.No.786 of 1993 was decreed in their favour and the suit filed by the respondents in OS.No.652 of 1988 was dismissed. Aggrieved by the common judgment and decree dated 31.01.2005 passed in OS.Nos.652 of 1988 and 786 of 1993, two regular first appeals were filed in AS.Nos.14 and 15 of 2005 by the plaintiffs in OS.No.652 of 1988 before the Sub Court, Gudiyatham. By common judgment and decree dated 31.01.2006 in AS.No.14 of 2005 and AS.No.15 of 2005, the appeals filed by the plaintiffs in OS.No.652 of 1988 came to be allowed and the judgment and decree passed by the trial Court on 31.01.2005 in favour of the appellants who are the plaintiffs in OS.No.786 of 1993 was set aside by the lower appellate Court. Aggrieved by the judgment and decree dated 31.01.2006, passed in AS.No.15 of 2005, this Second Appeal has been filed.

4. AS.No.15 of 2005 pertains only to the suit filed by the appellant before the trial Court in OS.No.786 of 1993. No separate second appeal has been filed with regard to the suit in OS.No.652 of 1988, which is the subject matter of AS.No.14 of 2005. At the time of admission of second appeal on 08.09.2006, the following substantial questions of law were framed by this Court :-

“a) Whether the fourth defendant has discharged the burden and proved Ex.B4 Will as



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per Sections 68, 69 and 71 of the Indian Evidence Act?

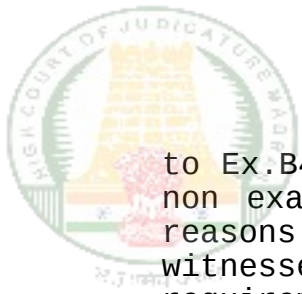
b) Whether the learned Lower Appellate Judge is justified in decreeing the suit in favour of the plaintiff in OS.No.652 of 1988 and dismissing the suit filed by the plaintiff in OS.No.786 of 1993 merely basing on the surmises and conjectures and without application of law?"

5. The learned counsel for the respondents at the outset would submit that this second appeal is not maintainable, in view of the fact that no second appeal has been filed by the appellant challenging the findings of the lower appellate Court in AS.No.14 of 2005 which is the subject matter of the suit filed by the respondents in OS.No.652 of 1988. Since, it is a common judgment without filing a separate second appeal, challenging the findings in AS.No.14 of 2005 alone which corresponds to OS.No.652 of 1988, the learned counsel for the respondent would submit that this second appeal is not maintainable.

6. In support of his submissions, the learned counsel for the respondent has also relied upon the judgment of a learned single judge of this Court in the case of Sundararaj v. R.Manoharan and 10 others reported in 2002 (4) CTC 94. Relying on the said judgment, the learned counsel for the respondent would submit that in similar circumstances, the learned single judge had held that if an appeal has been filed against one decree alone and no appeal has been filed against the other decree, the appeal was held not to be maintainable. Hence, the learned counsel for the respondent would submit that this second appeal has to be dismissed at the threshold stage itself as not maintainable.

7. The learned counsel for the appellant would submit that the appellant had discharged their burden of proving Ex.B4/Will as per Sections 68, 69 and 71 of the Indian Evidence Act. Therefore, according to him, the lower appellate Court has erroneously reversed the findings of the trial Court which has passed the decree in favour of the appellants in OS.No.786 of 1993. According to him, the scribe of the Will has been duly examined as witness before the Trial Court and therefore, the lower appellate Court ought to have confirmed the findings of the trial Court in OS.No.786 of 1993.

8. However, the learned counsel for the respondent would further submit that the statutory requirements as contemplated under Sections 68, 69 and 71 of the Indian Evidence Act have not been complied with by the appellant, as it is mandatory for them to examine one of the attesting witnesses to the subject Will (Ex.B4). He would submit that there are four attesting witnesses



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to Ex.B4/Will and no convincing reasons have also been given for non examination of any of the attesting witnesses. Since, no reasons have been given for non examination of the attesting witnesses, the appellants have not complied with the statutory requirements as contemplated under Sections 68, 69 and 71 of the Indian Evidence Act. Hence, he would submit that only in accordance with law, the lower appellate Court has reversed the findings of the trial Court in OS.No.786 of 1993. Section 68 of the Indian Evidence Act reads as follows :

"68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]".

9. As seen from Section 68 of the Indian Evidence Act, it is clear that a Will cannot be used as a piece of evidence unless and until atleast one of attesting witnesses who are alive has been examined. In the case on hand, admittedly none of the attesting witnesses to the Will/Ex.B4 has been examined as witness before the trial Court. No evidence has also been let in by the appellant before the trial Court to establish that none of the attesting witnesses were not alive at the time of letting in their oral evidence.

10. Under Section 69 of the Indian Evidence Act, it is also clear that If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person. As seen from the evidence available on record, the statutory requirement under Section 69 of the Indian Evidence Act has also not been complied with.

11. Since, as seen from the evidence available on records, the attesting witness to the subject Will/Ex.B4 has not been examined and no reasons have been given for the non examination of any of the attesting witnesses, this Court is of the considered view that only in accordance with law, the lower appellate Court has allowed the appeals filed by the respondents, by reversing the findings of the trial Court.



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12. Further, as rightly contended by the learned counsel for the respondents that when the appellant has filed only one appeal which pertains to AS.No15 of 2005 only, though the judgment passed by the lower appellate Court is a common judgment which pertains to AS.Nos.14 and 15 of 2005, which corresponds to the suits in OS.Nos.652 of 1988 and 786 of 1983 where a common judgment was passed. This second appeal is not maintainable in view of the fact that aggrieved by the findings of the lower appellate Court in AS.No.14 of 2005 which corresponds to OS.No.652 of 1988 in which a decree has been passed by the lower appellate Court in favour of the respondents no separate second appeal has been filed by the appellant.

13. The judgment relied on by the learned counsel for the respondents as cited supra is squarely applicable to the facts of the present case on hand also. Even on merits, the appellant has not made out any case for any interference by this Court under Section 100 C.P.C. Even on maintainability, the appeal is not maintainable for the reasons stated supra.

14. This Court finds, there is no merit in this second appeal and the substantial questions of law formulated by this Court at the time of admission of the second appeal are answered against the appellants.

15. In the result, the second appeal stands dismissed. No costs.

Sd/-
Assistant Registrar (CS-VIII)

// True Copy //

Sub Assistant Registrar

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To

1.The Sub Court,
Gudiyatham,
Vellore District.

2.The District Munsif,
Gudiyatham,
Vellore District.

+1cc to M/s.T.Dhanyakumar, Advocate SR.No.40150
+1cc to M/s.T.R.Rajaraman, Advocate SR.No.39929

S.A.No.983 of 2006

CP(CO)
RVM(26/10/2021)