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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2021

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THE HON'BLE MR. JUSTICE M.SUNDAR

S.A.No.350 of 2021

K.Krishnagopal

...Appellant/Plaintiffs

Vs.

1. R.V.Sampath Kumar
2. Mrs.Pushpa
3. G.Jogiswaran

...Respondents/Defendants

Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the judgment and decree dated 27.07.2020 in A.S.No.42 of 2016 on the file of the III Additional District Judge, Coimbatore confirming the judgement and the decree dated 14.03.2016 in O.S.No.668 of 2007 before the III Additional Subordinate Judge, Coimbatore.

For Appellant : Mr.A.Thiagarajan

JUDGMENT

Two concurrent judgments/decrees has brought the sole appellant in the captioned Second Appeal to this Court under Section 100 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity).

2. This litigation commenced more than 13 years ago when the appellant in this Second Appeal (as plaintiff) presented a plaint on the file of 'III Additional Sub-ordinate Judge's Court, Coimbatore' ('Trial Court' for the sake of brevity), which was taken on file as O.S.No.668 of 2007.

3. Prayer in the plaint was for a declaration that a registered Will dated 11.10.1989 is true, valid, genuine and for a consequential injunction restraining the defendants from interfering with possession qua suit property. The schedule in the plaint describes a property admeasuring 4120 sq.ft with building thereon at No.3, Syrian Church Road within the Coimbatore Corporation limits, Coimbatore Town and as far as the registration district is concerned, within Coimbatore Sub-Registration District and Coimbatore Registration District. To be noted, this extent of 4120 sq.ft land together with



building/superstructure thereat shall hereinafter be referred to as 'suit property' for the sake of convenience.

4. After full contest, the trial Court in and by judgment and decree dated 14.03.2016 dismissed the suit. Full contest includes 17 exhibits, namely Ex.A1 to A17 and three witnesses, namely PW 1 to PW3 on the side of plaintiff and 36 documents on the side of the defendants (Exs.B1 to B16). The plaintiff (appellant before me) Mr.K.Krishnagopal has examined himself as PW1.

5. Plaintiff carried the matter in appeal by way of a regular first appeal under Section 96 of CPC vide A.S.No.42 of 2016 on the file of 'III Additional District Judge's Court, Coimbatore' ('first Appellate Court' for the sake of brevity). First Appellate Court, after full contest, dismissed the first appeal primarily on the ground that the aforementioned Will/Testament has not been proved and suit is not maintainable without seeking recovery of possession. The first Appellate Court adhering to the rigour of Order XLI Rule 31 of CPC framed 4 neat questions as points for determination and the same are as follows:

'1. Whether cancellation of settlement deed dated 20.01.1961 made by Muthusamy Chettiar by a registered deed dated 28.06.1980 is valid or not?

2. Whether Revocation of earlier Joint WILL dated 02.01.1984 by Muniammal by subsequent WILL dated 11.10.1989 is proper?

3. Whether the Will said to have been executed by Muniammal in favour of the plaintiff on 11.10.1989 was true valid and genuine?

4. Whether the suit is maintainable without seeking from the relief of recovery of possession? '

6. After elaborately dealing with the legal position regarding proving a testament, revocation and validity, first Appellate Court answered points 3 and 4 in the following manner:

'Point No.3

3. Whether the WILL said to have been executed by Muniammal in favour of the plaintiff on 11.10.1989 was true valid and genuine?

41. The recitals in Ex.A17 also speaks as if the said Muniammal had revoked the earlier WILL dated



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02.01.1984. Therefore, when execution is admitted subsequent proof may not be necessary. The question to be decided is whether the plaintiff has proved the execution of Ex.A17 as per law. In order to prove the same he had examined one of the attesor name K.Kannan as PW2. PW2 during cross examination has deposed that , he was not in any way related to Muniammal and there were no transaction between them. Though in his chief examination he has stated that his father and Muthusamy Chettiar were family friends and he used to visit their home, during cross examination he has stated that he was not related to Muniammal and there were no transaction. It is his specific evidence that since Muniammal had no other relatives she invited him to attest the WILL. Admittedly he had not attested any of the documents prior to Ex.A17. Then how Muniammal had invited him is not explained. The same observation was made by the trial court and even in the appeal there is no explanation for the same. During further cross examination PW2 has deposed that, he did not inform his address to the plaintiff and he was also not invited by the plaintiff to depose evidence in this case. If PW2 had not informed the plaintiff about the will, then how the plaintiff came to know about the WILL is not explained. PW1 cross examination has stated that he did not know when the WILL was executed. It is not his case that the other attesor named Narayanan informed him about the will. Though the 2nd attesting witness Narayanan was his relative he has not chosen to examine him as a witness. Whether the said Narayanasamy is alive or not is also not known. The Plaintiff has not stated when he came to know about the execution of the WILL and when and through whom he got the original WILL in his hand. These unanswered questions raises serious doubt regarding the genuineness of the will said to have been executed by Muniammal. Evidence of Pw3 is of no use to ascertain to ascertain the execution of the WILL, since he is neither an attesor or a scribe. Though the WILL Ex.A17 shows the plaintiff as foster son, no valid documents or materials have been produced to prove the same. The plaintiff has not removed all the suspicion surrounding the WILL by giving a clear evidence. The address of the Muniammal as shown in Ex.A17 is admittedly is not the actual address of the Muniammal. Her death certificate shows that she died at No.76/4, Sherian Church Road, where the suit schedule property is situated. Whereas the address in the WILL Ex.A17, shows her address as Saibaba colony, Coimbatore. It is not the plaintiff's case that Muniammal was living



elsewhere. These discrepancies are also not explained. Therefore, this court holds that, the will Ex.A17 is not proved to be a genuine one. In the result Point No.3 is decided against the plaintiff.'

Point No.4

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'4. Whether the suit is maintainable without seeking from the relief of recovery of possession?

42. During cross examination the plaintiff has admitted that the defendants are residing in the suit schedule properties and that he has also initiated rent control proceedings against the defendants addressing them as tenants. After the death of Muniammal the defendants have transferred the house tax receipts, electricity connection receipts in their name by initiating appropriate proceedings and the same is evident from Ex.B21 to Ex.B30 which are the house tax receipts, water charges receipts and the Electricity charges receipts. These documents show that the defendants are in possession of the property. Admittedly the plaintiff has not paid any property tax to the suit schedule properties. He has not proved his possession in the suit property at any point of time. Citing the same the counsel for the defendants argued that the suit for declaration alone without seeking for the relief of recovery of possession is not maintainable. Even though, in the written statement in para 4 the defendants have stated that they were residing in the suit property for more than 25 years, the plaintiff had not taken any steps to amend the relief for recovery of possession. Therefore, it is clear that, the defendants are found to be in possession absolutely. The plaintiff he should have sought for the relief of recovery of possession as held by the Hon'ble Supreme Court in Anathulla Sudhakar's case.

43. Yet another judgment of the Hon'ble Supreme Court reported in the matter of Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and others reported in 2017 1 L.W.856 has held as follows:

".....35. In the present case, the plaintiff having been found not to be in possession and having only sought for declaratory reliefs, the suit was clearly not maintainable and has rightly been dismissed by the trial court. In this context the reference is made to the judgment of this Court reported in Ram Saran and Anr. versus Smt. Ganga Devi, AIR 72 SC 2685, wherein para 1 & 4 following was stated:



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"1. This is a plaintiffs' appeal by special leave. Ram Saran and Raghubir Saran, the plaintiffs are brothers. They jointly owned suit property with Chhabili Kuer widow of Lalita Prasad. After the death of Chhabili Kuer on February 8, 1971, Ganga Devi the defendant in the suit came forward as the legal representative of Chhabili Kuer and got the mutation effected in her name in the place of the deceased Chhabili Kuer. In 1958, the plaintiffs brought this suit for a declaration that they are the sole owners of the suit properties. They did not claim possession either of the entire or even any portion of the suit properties.

4. We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding Courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable."

44. The plaintiff who is not in possession of the property and who is not able to establish his possession will have to seek for the relief of possession. In this case, though the plaintiff is admittedly not in actual and physical possession of the property has not sought for recovery of possession. Therefore, the suit is not maintainable without seeking for the plea of recovery of possession.'

(underlining made by this Court to supply emphasis and for ease of reference)

7. Five questions have been set out in the instant memorandum of grounds of appeal, the same have been propounded as substantial question of law by protagonist of captioned second appeal and these five questions read as follows:

'1. Whether the execution of the registered settlement deed Ex.A3 dated 20.11.1961 by Muthusamy Chettiyar is valid in law and confers right and title upon his wife Muniammal?

2. Whether the unilateral cancellation of Ex.A3 by Muthusamy Chettiyar by executing Ex.B2 cancellation deed is legally valid?



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3. Whether the execution of Ex.B36 dated 02.01.1984 the joint will can confer right on D1 & D2/R1& R2 particularly when Muniyammal later has executed a registered will Ex.A-17 dated 11.10.1989 in favour of the appellant/plaintiff?

4. Is Ex.B36 admissible in evidence without following the procedures in Sec.65 of the Indian Evidence Act?

5. Whether a prayer for recovery of possession is necessary, while there is a prayer for eviction?

8. This Court now embarks upon the exercise of examining whether substantial question/s of law arise/s in captioned second appeal. This Court, for the purpose of this legal drill under Section 100 CPC deems it appropriate to remind itself about two legal principles. One legal principle turns on a conjoint reading of Kanailal principle [Kanailal and Others Vs. Ram Chandra Singh and Others reported in (2018) 13 SCC 715] and the other is Kirpa Ram principle [Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935]. Kanailal principle is to the effect that rigour of Order XLI Rule 31 CPC will stand telescoped into a Section 100 CPC legal drill also. Kirpa Ram principle reiterates the obtaining position that a 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 Kanailal and Kirpa Ram principles deems it appropriate to record that the lone point for determination in captioned second appeal is whether any substantial question of law arises in this case owing to the concurrent judgments of Courts below which turn on principles governing proving of a testament?

9. This Court now proceeds to give its decision on the aforementioned point for determination with reasons for the decision. Before doing the same, this Court deems it appropriate to remind itself about what is a substantial question of law and more particularly what is 'substantial question of law' as an expression occurring in Section 100 CPC. To be noted, this expression is not defined in CPC. What is substantial question of law as an expression occurring in 100 CPC first came up for consideration before a Full Bench of this Court and a Hon'ble Full Bench of this Court answered the same 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 was affirmed by a 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]. Rimmalapudi Subba Rao principle and



affirmation of the same by a Hon'ble Constitution Bench of Supreme Court has been neatly captured by Hon'ble Supreme Court 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 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."



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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 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."

10. On a careful consideration of the manner in which the first Appellate Court has dealt with points for consideration, more particularly Point Nos.3 and 4, it is clear that no question that is res integra or no question that warrants a debate arises in the instant case. More particularly, no settled legal principle has been given a go by or no settled legal principle has been disregarded. On the contrary, settled legal principles regarding proving a testament and principles regarding revocation of testament have been adhered to by first Appellate Court. This Court has already extracted and reproduced supra the manner in which the first Appellate Court has dealt with Points 3 and 4, besides extracting and reproducing the four points for determination which the first Appellate Court drew up. First Appellate Court has also discussed the entire gamut of case laws and culled out 6 points as obtaining legal position regarding revocation of joint Will. This is captured in paragraph 30 of first Appellate Court judgment, which reads as follows:

'30. Therefore, the legal position regarding the revocation of a joint WILL as understood from the above judgment is as follows:

1. If a Joint will is executed in respect of separate properties or self acquisitions of the individuals, the individual has the power to revoke his part any time.

2. If a Joint will is executed in respect of the properties acquired jointly, each of the share holders enjoy the property as tenants in common and not as



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joint tenants. Therefore on the death of any one, his legate would be entitle to the property of the testator. The share would not devolve upon the joint owner/survivor and hence the Joint Owner/survivor would have no power to revoke.

3, If a Joint WILL is executed in respect of joint properties, alienation by any one of them singly would be invalid.

4. If the will is executed in respect of the joint properties and if the will confers any right inter se on the testators, the power of revocation is implied, subject to the extent of the interest, so conferred?

5. If the property was intended to be kept in tact for the enjoyment of the legatees during the life time of either of the testators, the survivor have no right to revoke. Such intention need not be express, it can be implied.

6. Such a joint or mutual Will become irrevocable on the death of one of the testators, if the survivor had received the benefits under the mutual Will?'

11. The preceding paragraphs qua aforementioned paragraph 30 discuss various case laws on the subject and this Court deems it appropriate not to burden this judgment with the same. Suffice to say that the first Appellate Court has applied the obtaining legal position correctly. This takes us to the five questions which have been proposed as substantial questions of law. Applying the Rimmalapudi Subba Rao principle as affirmed in Century Spinning Mills case, the concomitants of substantial questions of law much less determinants which would go to constitute that expression occurring in Section 100 CPC certainly do not arise in the case on hand as there is no matter that is res integra arises. As already alluded to supra, no settled legal principle has been given a go by.

12. This takes us to the observation of first Appellate Court that the suit is not maintainable without seeking the plea of recovery of possession. Therefore, if the plaintiff chooses to file a suit for recovery of possession, though obvious it is made clear that this judgment of this Court in captioned second appeal will not impede the same but such a suit will be tested on its own merits and in accordance with law.



In the result, this second appeal is dismissed at the admission stage holding that no substantial question of law arises in this second appeal. In the light of the nature of the matter and in the light of submissions made before this Court, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gpa

To

1. The III Additional District Judge,
Coimbatore.
2. The III Additional Subordinate Judge,
Coimbatore.

Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

+1cc to Mr.A.Thiyagarajan, Advocate, Sr.23040

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NSK 22/10/2021